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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-206

In re Applications of

SACRED HEART UNIVERSITY, INC
(hereafter "Sacred Heart")
Channel 202B1
Shirley, New York — File No. BPED-891215MD

LONG ISLAND EDUCATIONAL TV COUNCIL, INC.
(hereafter "LI Educational")
Channel 202B
Ridge, New York — File No. BPED-900522MA

For Construction Permit for a
New Educational FM Station

LONG ISLAND UNIVERSITY
(hereafter "LIU")
Channel 202B1
Southampton, New York — File No. BPED-900522MI

For Modification of the
facilities of Station WPBX(FM)

HEARING DESIGNATION ORDER

Adopted: June 28, 1991; Released: July 29, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station, and modification of the facilities of Station WPBX(FM).[1]

2. *Preliminary Matter.* On November 19, 1990, LIU filed an amendment to its application requesting a change in transmitter site, effective radiated power (ERP), and antenna height above average terrain (HAAT). Pursuant to 47 C.F.R. § 73.3573(a), the amendment is a "suicide" amendment since its acceptance would constitute a major change requiring the assignment of a new file number to the application and would result in the dismissal of the LIU application from the instant proceeding. Under 47 C.F.R. § 73.3573(a), a major change is..."any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1mV/m field strength contour." Our engineering analysis of the amendment computes the change to be 86.5%.

3. On January 2, 1991, Sacred Heart filed a "petition to deny" LIU's November 19, 1990 amendment.[2] Sacred Heart asserts that LIU's amendment is unacceptable for filing because it (1) constitutes an untimely "major" change as contemplated by 47 C.F.R. § 73.3573(a)(1) of the Commission's Rules, and (2) because the main studio and community of license will both fall outside the city grade contour (3.16 mV/m) of the amended proposal. The staff is in agreement with Sacred Heart's position in this matter. Commission precedent provides for the nonacceptance and predesignation return of major amendments which would cause the dismissal of mutually exclusive applications. *See Golden Shores Broadcasting, Inc.*, 2 FCC Rcd 4743 (1987). *See also Tequesta Television, Inc.*, 2 FCC Rcd 41 (1987), *modifying* 103 FCC 2d 1182 (Rev. Bd. 1986); *Redwood Television Ministries*, 52 RR 2d 1365 (1982). Consequently, the amendment will be returned.[3]

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[1] On October 25, 1988, the application (File No. BPED-841031IG) of Quinnipiac College to improve the facilities of station WQAQ(FM), Hamden Connecticut from Class D to Class A facilities was dismissed due to the creation of an intermediate frequency short-spacing to station WPLR(FM), New Haven, Connecticut. Quinnipiac filed an application for review of that action on December 5, 1988, which remains pending at this time. LIU's application would cause interference to Quinnipiac's proposal. Therefore, any grant of LIU's application will be conditioned on the outcome of the application for review.

[2] On January 16, 1991, LIU filed a motion for extension of time to respond to Sacred Heart's petition.

[3] We believe that the return of LIU's amendment is consistent with the recent opinion by the U.S. court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, Decided June 15, 1990. In that case, the Court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. { 73.3571(j). The court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. *Id*, at 7. *Golden Shores*, wrote the court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante*." *Id.*, at 8. In *Alegria*, the court noted that Heritage made no attempt to return to the *status quo ante;* rather, "the Commission permitted Heritage repeatedly to amend its application until it was viable." *Id.*, at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of LIU's amendment neither results in processing delays nor abridges any cognizable rights of other applicants." *Id.*, at 7.

4. Our records indicate that Sacred Heart and LI Educational have applied to the National Telecommunications and Information Administration for funding. However, we have not been notified that either of those applicants have received such funding at this time. Accordingly, a financial issue will be specified below.

5. *LI Educational.* LI Educational proposes to mount its antenna on the existing tower of station WLIG(TV). However, its proposal contains several discrepancies *vis-a-vis* the Commission's records for that tower. The applicant specifies that the WLIG(TV) tower height is 194 meters above ground level (AGL) and 223 meters above mean sea level. The Commission's data base indicates that the proper heights are 196 meters AGL and 222 meters AMSL. Because LI Educational is proposing to mount on an existing broadcast tower, these discrepancies do not constitute an acceptability defect. However, LI Educational must either amend its application to correct this discrepancy or refile with the FAA to correct its records.

6. Our engineering study indicates that each of the applicants here failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment," (released January 24, 1986). Under the Commission's environmental rules, applicants must determine whether or not their proposals would have a significant environmental effect under the criteria set forth in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under these criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Furthermore, 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Sacred Heart, LI Educational, and LIU failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. §1.1311. *See generally* OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, the applicants must each submit an EA to the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that any of the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

7. The Applicants have indicated that an attempt has been made to negotiate a share-time arrangement, but that no such agreement has yet been reached. Therefore, an issue will be specified to determine whether a share time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the Hearing, from participating in negotiation with a view toward establishing a share-time arrangement.

8. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Sacred Heart and LI Educational, whether the applicants are financially qualified.

2. If a final environmental impact statement is issued with respect to Sacred Heart, LI Educational, or LIU in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and

whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That any grant of LIU's shall be conditioned on the outcome of the application for review filed on December 5, 1988 by Quinnipiac College.

12. IT IS FURTHER ORDERED, That the "petition to deny" LIU's November 19, 1990 amendment, filed by Sacred Heart on January 2, 1991 IS HEREBY GRANTED to the extent indicated herein, and LIU's amendment IS HEREBY RETURNED.

13. IT IS FURTHER ORDERED, That LI Educational shall file the corrective amendment specified in paragraph 5 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the applicants shall file the environmental assessments specified in paragraph 6 above within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLDVIEW, INC.

Application for Initial Station License for a Receive-Only Earth Station in Iowa City, Iowa — File No. CSG-88-002 ML

Application for Initial Station License for a Receive-Only Earth Station in Washington, D.C. — File No. CSG-88-003 ML

ORDER

Adopted: July 22, 1991; Released: July 29, 1991

By the Chief, International Facilities Division:

1. On August 17, 1987, WORLDVIEW, INC., filed the two above-captioned applications, seeking authority to construct and operate receive-only earth stations in the domestic fixed satellite service in Washinton, D.C. and in Iowa City, Iowa. The applications also proposed to receive transmissions from the Soviet Union's Molniya and Ghorizont satellite systems to be utilized for academic and instructional purposes.

2. Subsequent to the filing of these applications, numerous attempts were made on the part of the Commission to contact WORLDVIEW, INC., both directly and through WORLDVIEW's last known counsel. On June 26, 1991, the Commission mailed a letter to the last forwarding address of WORLDVIEW, INC. requesting WORLDVIEW, INC. to respond to the Commission within 30 days and notifying WORLDVIEW, INC. that failure to respond would result in the dismissal of both applications. The letter was returned to the Commission.

3. Accordingly, IT IS ORDERED that the two applications of WORLDVIEW, INC., File Nos. CSG-88-002 ML and CSG-88-003 ML ARE DISMISSED.

4. This order is issued under Section 25.112 of the Commission's Rules (6 FCC Rcd 2806 (1991)) and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAN AMERICAN SATELLITE — File No. I-S-P-91-002

Request for Waiver to Provide Certain Services to and from Eastern Europe

PAN AMERICAN SATELLITE — File No. I-S-P-91-003

Request for Waiver to Provide Certain Services to and from the Dominican Republic

MEMORANDUM OPINION ORDER AND AUTHORIZATION

Adopted: July 22, 1991; Released: July 29, 1991

By the Chief, Common Carrier Bureau:

1. The Commission has before it for consideration applications filed by Pan American Satellite (PAS) for a waiver of the restriction imposed on separate satellite systems prohibiting interconnection with the public switched network (PSN) in order to permit service between the United States and the Dominican Republic and between the United States and Eastern Europe. The applications were placed on the Commission's public notice. The Communications Satellite Corporation (Comsat) and Telepuerto San Isidro, S.A. d/b/a/ Tricom (Tricom) filed comments and PAS filed reply comments.

I. THE APPLICAITONS

2. *Use of the PAS system for service between the U.S. and the Dominican Republic.* PAS states that it has received several service requests from Tricom, a privately-owned, new telecommunications entrepreneur in the Dominican Republic. Tricom is licensed to compete with the national telecommunications company, Codetel, and is seeking PAS-1 satellite capacity to be used in offering U.S.-Dominican Republic traffic, including services connected to the PSN. According to PAS, the proposed service offerings fall into the three categories: 1) telephone traffic between the Dominican Republic and the United States; 2) a southbound "800"-type telecommunications service from the United States to the Dominican Republic; and 3) private line services between the two countries connected with the PSN via a PBX or modem.

3. With respect to telephone service, PAS notes that in the absence of its proposed service, Tricom would have the choice of using either INTELSAT capacity via Codetel, or a domestic satellite under a Transborder authorization.[1] The first option would do little to promote competition since it would make Tricom dependent on the service provided by its competitor, Codetel, which has consistently resisted efforts to introduce telecommunications competition in the Dominican Republic. According to PAS, use of domestic satellites, even if permitted, would present the same degree of economic harm to INTELSAT as would the PAS-1 satellite. The toll-free "800"-type service would permit customers in the United States to make toll-free calls to various information processing centers in the San Isidro Free Trade Zone (such as airline or hotel reservation services), where the calls would terminate without interconnecting with the PSN. The proposed private-line services would consist mainly of intracorporate data and voice communications. However, PAS states that it would be necessary to connect the private line circuits into corporate PBXs, with the option of switching traffic into the PSN, in order to reach other corporate offices or affiliated businesses not tied to the private network and for dialing out of the PBX for business-oriented communications.

4. PAS believes that a waiver of the PSN restriction in the case of the Dominican Republic is justified since PAS is not proposing to compete for high-density, transoceanic traffic but rather proposing service to a developing country. PAS also points to the high accounting rates that currently exist between the U.S. and Latin American countries, including the Dominican Republic. According to PAS, Tricom has been trying to bring down U.S.-Dominican Republic telephone rates by injecting the discipline of a competitive marketplace into the pricing practices of Codetel. Thus, PAS views a grant of a waiver as also fostering the Commission's objectives set forth in the *International Accounting Rate* proceeding.[2] It would also spur the initiative of aspiring entrepreneurs in Latin American countries, instead of the present result of forcing them to conform to bureaucratic barriers maintained by Latin American telecommunications administrations. As a result, PAS states that U.S. companies and entrepreneurs are being deprived of the opportunity to benefit from the competitive supply of PSN services.

5. *Use of the PAS system for service between the U.S. and Eastern European countries.* PAS also requests a waiver of the PSN restriction to permit immediate service between the United States and Eastern European countries. PAS notes that the PSN restriction was implemented in 1985, to preclude competition to INTELSAT's carriage of public switched traffic. PAS notes that at that time INTELSAT neither carried, nor projected carrying, traffic between Eastern Europe and the United States. Thus, PAS believes that the proposed services should be viewed as involving new traffic, the carriage of which should be seen as market expansion. PAS cites the fall of Communist regimes in Eastern Europe and the resulting opening of Eastern Europe to investment as an export market as leading to the rapid growth in the demand for international telecommunications services. PAS states that this demand cannot be readily met through these nations' existing communications infrastructures, which are underdeveloped by Western standards. To accommodate this demand, PAS proposes to provide subscription telephone service, corporate network services and packet-switched networks. PAS believes that allowing it to provide these services would allow U.S. operators access to the telecommunications market in Eastern Europe and would promote a full range of competitive facilities and services in the new Eastern European market.

6. PAS notes that the subscription telephone service would not be generally available to the public in either Eastern Europe or the United States, but would allow businesses in Eastern Europe to subscribe to an international private line service with access to the U.S. toll network. The corporate network services would be for intracorporate private line data and voice communication networks. PAS states that it would be necessary to connect the private line circuits into corporate PBXs, with the option of switching traffic into the PSN, in order to reach other corporate offices or affiliated businesses not tied to the private network and for dialing out of the PBX for business-oriented communications. PAS envisions the PSN connection as being incidental to the service, and would be identical to the operation of private line circuits now carried on transoceanic fiber optic systems and on INTELSAT's IBS offering. PAS also expects there to be significant demand from Eastern Europe for access to U.S. packet-switched networks, which in turn access the highly developed U.S. databases. PAS views this service as particularly applicable to Eastern Europe where many of the potential users would not be able to afford leased line access to the packet networks.

II. PLEADINGS

7. By letter dated November 20, 1990, PAS noted that INTELSAT's Assembly of Parties at its November 1990 meeting (AP-16) delegated to the Board of Governors authority to consult separate satellite systems for traffic interconnected with the PSN, at or below a threshold level of 100 64 Kbps-equivalent circuits (100 circuits). PAS also requested that Comsat be instructed to initiate the appropriate Article XIV(d) consultation to allow use of the PAS-1 satellite for PSN-interconnected services, up to the 100 circuit threshold. By letter dated February 5, 1991, PAS clarified its November 20, 1990 letter. First, PAS noted that while its waiver requests related only to the Dominican Republic and Eastern Europe, it did not wish the consultation concerning PSN traffic to be so limited. Second, PAS stated that there is substantial demand for PSN services involving the Dominican Republic and Eastern Europe and that 100 circuits would not be adequate to meet all of the PSN-related needs in those areas. Thus, PAS sought an immediate INTELSAT consultation to provide PSN-interconnected services, up to the maximum 100 circuits between the U.S. and any nation that associates with a U.S. request and broader waiver authority for more than the maximum 100 circuit limit to serve urgent PSN-related needs in the Dominican Republic and Eastern Europe.

8. Comsat does not object to PAS's waiver as long as it is limited in the aggregate to 100 circuits interconnected with the PSN, provided that the conditions set forth in the Murrin-Eagleburger letter [3] are met and Section 146 of the Foreign Relations Authorization Act is satisfied. To the extent that PAS seeks to exceed the 100 circuit limitation, Comsat states that the Commission lacks authority to modify or repeal the restrictions on interconnection with the PSN absent further action by the Executive Branch.

9. Tricom filed comments in support of PAS's waiver request. Tricom states that it has not been able to obtain access to INTELSAT or the Transcaribbean Cable System (TCS-1) which are both controlled by Codetel. In addition, Tricom states that Codetel has undertaken to control the microwave link to Puerto Rico by requiring an exclusive arrangement with Telefonica Larga Distancia (TLD), the Puerto Rico long distance carrier. Thus, while TLD has expressed interest in providing service to Tricom, its exclusive arrangement with Codetel prohibits it from doing so. As a result, Tricom states that the only possibility for it to establish itself as a true competitor in the Dominican market is through use of PAS satellites. Tricom believes that the most compelling argument for modification of the Separate Systems policy is the manner in which Codetel has used it successfully to engage in anticompetitive practices. In this regard, Tricom notes that while the PAS system is unavailable to Tricom, Codetel has offered it reasonable access to TCS-1 and INTELSAT, and to release TLD from its exclusive arrangement, if and only if, Tricom agrees to (1) renounce its authority to provide local exchange service and (2) agree not to charge accounting or collection rates lower than Codetel's.

10. In its reply to Comsat's comments, PAS cites recent events in Eastern Europe as making it more urgent that it be able to offer a wide variety of services (including PSN-interconnected services) with the emerging democracies of the region. PAS notes that its pending petition for Rule Making to remove the restriction against PSN-interconnected services was supported by over 50 parties, with Comsat registering the sole opposition.[4] Subsequent to this show of support, PAS notes that the Departments of State and Commerce indicated that they would conduct an expeditious review of Executive Branch policies regarding separate satellite systems. PAS does not believe that the Commission should delay action on its waiver requests pending the outcome of the Executive Branch's review.

III. DISCUSSION

11. The subject applications propose the use of non-INTELSAT space segment facilities to provide international service interconnected with the public switched network. U.S. policy with respect to the use of non-INTELSAT facilities for the provision of public international telecommunications services has been established under the Transborder and Separate Systems policies. Under the Separate Systems policy which is implicated by the applications here, separate international satellite systems may be established provided that they are restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).[5]

12. The Separate Systems policy is based on the policy underpinnings of the Communications Satellite Act of 1962 (Satellite Act), as amended, 47 U.S.C. §§701-744. The Satellite Act provides for U.S. participation and support of the INTELSAT global commercial satellite system. Although the United States is a Party to the INTELSAT Agreement and is committed to a strong, viable INTELSAT system, the Satellite Act clearly does not require or contemplate the sole use of INTELSAT to satisfy U.S. requirements for international satellite services. It specifically provides for the creation of additional satellite systems if " . . . required to meet the unique governmental needs or if otherwise required in the national interest."

47 U.S.C. §701(d).[6] The Executive Branch determines whether the use of non-INTELSAT facilities is in the national interest.[7]

13. In the matter before us, the Executive Branch has provided the Commission with the conditions upon which we can authorize use of the separate international satellite systems for service interconnected with the public switched network consistent with U.S. foreign policy and the national interest. In a joint letter dated December 14, 1990 the Departments of State and Commerce notified the Commission that the INTELSAT Assembly of Parties had taken actions which implicitly recognize that, as a generic matter, separate systems interconnected to the PSN at or below the specified threshold of one-hundred (100) 64 Kbps-equivalent circuits would not cause significant economic harm to INTELSAT.[8] In light of the Assembly of Parties' recognition that an absolute interconnection prohibition is not necessary to protect the global system of INTELSAT from significant economic harm, the Departments of State and Commerce stated that they view applications which propose interconnection of up to one-hundred 64 Kbps-equivalent circuits as consistent with the international obligations of the United States and in furtherance of its telecommunications and foreign policy interests, provided that use and operation of such circuits commence only after the discharge of U.S. obligations under Article XIV of the INTELSAT Agreement and after one or more foreign authorities have authorized the use of these circuits.

14. In light of the above considerations we find that, subject to the limitations set forth herein, the public interest requires the grant of PAS's waiver requests insofar as they propose to provide service interconnected with the PSN between the U.S. and the Dominican Republic, Eastern Europe and other locations using the PAS system to provide space segment capacity not to exceed 100 circuits in the aggregate.[9] The Commission has previously determined after consultation with the Executive Branch that the competition afforded by separate international satellite systems would serve the public interest.[10] We find that those same benefits would also result from the limited provision of PSN-connected services that would be provided over PAS's system. Common carriers wishing to utilize PAS capacity to provide services interconnected with the PSN will be required to file for appropriate authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate such capacity. Our grant of the PAS waiver requests, to the extent they contemplate the provision service within the limited 100 circuit exception to existing PSN-interconnection restrictions on separate systems, is also conditioned on the completion of appropriate consultation procedures under Article XIV(d) of the INTELSAT Agreement and notification by the State Department to the Commission that U.S. international obligations have been satisfied with respect to the use of the PAS-1 satellite for service between the U.S. and international points.

15. We deny that portion of PAS's request that seeks authority to exceed the 100 circuit per separate system limitation. In the absence of a further determination by the Executive Branch that the use of non-INTELSAT facilities beyond the 100 circuit limitation is in the national interest, there is no basis to authorize PAS's request to exceed the 100 circuit limitation.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the applications of PAS for waiver, File Nos. I-S-P-91-002 and I-S-P-91-003, ARE GRANTED to permit PAS to provide a total of 100 64 Kbps-equivalent circuits over its system for the provision of services interconnected with the public switched networks between the U.S. and the Dominican Republic, Eastern European countries that are not members of INTELSAT, Costa Rica, Bahamas and the United Kingdom.[11]

17. IT IS FURTHER ORDERED that no service may be implemented between the U.S. and countries not specified in paragraph 16 above until the Commission receives notification from the State Department that the U.S. obligations under Article XIV of the INTELSAT Agreement have been met and that one or more foreign authorities have authorized the use of these circuits.

18. IT IS FURTHER ORDERED that any common carrier seeking to utilize PAS capacity to provide services interconnected with the PSN shall file a Section 214 application to acquire and operate such capacity.

19. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation of the PAS system in accordance with the parameters summarized and conditions described in INTELSAT, Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

20. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Under the Commission's Transborder policy domestic satellites may be used to provide public international telecommunications service where: 1) INTELSAT is incapable of providing the service; or 2) it would be clearly uneconomical or impractical to use the INTELSAT system for the service. *See Transborder Satellite Video Services*, 88 FCC 2d 258 (1981); *Satellite Business Systems*, 88 FCC 2d 195 (1981).

[2] *Regulation of International Accounting Rates*, Notice of Proposed Rule Making, 5 FCC Rcd 4948 (1990); Phase I Report and Order, FCC 91-157 (released May 23, 1991); Phase II Further Notice of Proposed Rule Making, FCC 91-158 (released May 23, 1991).

[3] Letter from Thomas J. Murrin, Deputy Secretary of Commerce, and Lawrence S. Eagleburger, Deputy Secretary of State, to Alfred C. Sikes, Chairman, Federal Communications Commission (December 14, 1990). *See infra* para. 13.

[4] *Petition for Rule Making to Modify Commission Policies Established in CC Docket No. 84 - 1299 Relating to Separate Satellite Systems*, RM-7562, filed July 18, 1990.

[5] *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985), *reconsideration*, 51 Fed. Reg. 17631 (May 14, 1986), *further reconsideration*, 1 FCC Rcd 439 (1986).

[6] Additionally, Congress has declared it to be U.S. policy " . . . to make available to consumers a variety of communications satellite services utilizing space segment facilities of INTELSAT and any additional such facilities which are found to be in the national interest . . . " and which are technically compatible with and avoid significant economic harm to the INTELSAT system. Public Law 99-93, 99 Stat. 425, Sec. 146, August 16, 1985.

[7] Letter from James L. Buckley, Under Secretary of State, to Mark Fowler, Chairman, Federal Communications Commission (July 23, 1981); Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission (November 28, 1984).

[8] *See supra* note 3.

[9] We find no reason to limit the provision of PSN-connected traffic up to the 100 circuits limitation to only the Dominican Republic and Eastern Europe. INTELSAT's determination to relax the PSN restriction up to 100 circuits per separate system does not specify particular countries. However, consultations under Article XIV(d) of the INTELSAT Agreement must be completed for each country. By letter dated March 13, 1991 the State Department notified the Commission's International Facilities Division that U.S. obligations under Article XIV(d) of the INTELSAT Agreement have been satisfied with regard to the use of the PAS-1 satellite for the provision of communications interconnected with the PSN between the U.S. and Costa Rica, Dominican Republic, Bahamas, and Eastern European countries that are not members of INTELSAT. In a letter dated June 20, 1991 the State Department notified the Commission that U.S. obligations under Article XIV(d) of the INTELSAT Agreement have been satified with respect to the use of the PAS-1 satellite for the provision of services interconnected with the PSN between the U.S. and the United Kingdom.

[10] *See Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d at 1084.

[11] *See supra* note 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cross Country Telecommunications, Inc. — Application File No. 753074

Applications for Station Authorization in the Private Operational-Fixed Microwave Service

Petition for Reconsideration

ORDER

Adopted: July 19, 1991; Released: July 29, 1991

By the Deputy Chief, Private Radio Bureau:

I. INTRODUCTION

1. Cross Country Telecommunications, Inc. (Cross Country) seeks reconsideration of the dismissal of its license application for microwave Channel H-3 in New York City.[1] The Private Radio Bureau's Licensing Division dismissed Cross Country's application after concluding that it was defective because Cross Country's proposed station would be operating within the protected service area of an existing co-channel licensee without that licensee's consent.[2] Upon review of the record, we agree that Cross Country's application was defective and affirm the dismissal thereof.

II. BACKGROUND

2. The license application that forms the basis of this controversy is one of two mutually exclusive applications received for Channel H-3 in New York City as the result of a filing period announced in late 1988.[3] Both Cross Country and the other applicant, Microband Wireless Cable of New York, Inc. (Microband), propose systems to be located on top of the Empire State Building, which is approximately 12.3 miles from a grandfathered, low power point-to-point system on Channel H-3 licensed to United Airlines (United).[4]

3. Microband filed its application in June of 1989, indicating that it had obtained United's consent to its proposed operations and therefore was eligible to be licensed because it had complied with 47 C.F.R. § 94.15(b)(2).[5] The Commission found Microband's application acceptable for filing and placed it on public notice.[6] Shortly thereafter, Cross Country contacted United seeking United's consent to its proposed operations on Channel H-3. United did not give Cross Country its consent, however, because United had given exclusive consent to Microband.[7] Cross Country nevertheless proceeded to file an application for a system very similar to that proposed by Microband.[8] In its application, Cross Country disclosed that its proposed station was mutually exclusive with the station proposed by Microband, and that it would be located within 50 miles of United's existing station. Cross Country also noted that it had not obtained United's actual consent, but represented that its application satisfied Section 94.15(b) because (1) United had agreed to accept the level of interference caused by Microband's proposed system; (2) Cross Country's proposed operations are essentially identical to those of Microband; and (3) Cross Country would match any additional interference protection measures that formed the basis of the agreement between United and Microband.[9]

4. The Licensing Division dismissed Cross Country's application as incomplete and defective after determining that neither the professed similarity between Cross Country's proposed operations and those proposed by Microband nor Cross Country's pledge to match the terms of Microband's arrangement with United could be used to substitute for United's actual consent.[10] In addition, the Licensing Division explicitly noted that Cross Country had failed to request a waiver of the applicable assignment criterion.[11]

5. Thereafter, Cross Country filed the instant Petition for Reconsideration requesting reversal of the Licensing Division's decision.[12] Cross Country argues that the dismissal of its application on the basis of its failure to obtain United's consent is arbitrary and capricious because Section 94.15(b)(2) does not permit an existing licensee such as United to give a short-spaced applicant its exclusive consent, nor does it require each short-spacing applicant to secure an affected licensee's actual consent. In this connection, Cross Country further maintains that its application complied with Section 94.15(b)(2) by indicating that United had agreed to accept the level of interference to be caused by Microband's operations and that Cross Country's proposed system was essentially identical to Microband's.[13] In addition, Cross Country contends that the Licensing Division erred in failing to construe an exhibit appended to Cross Country's application, in which Cross Country described its inability to obtain United's consent and asserted that it complied with the Commission's Rules by submitting an application substantially similar to Microband's, as a request for waiver.[14]

III. DISCUSSION

6. We have carefully examined the pleadings and the rule at issue and conclude that Section 94.15(b)(2) requires each short-spacing applicant to obtain the actual consent of affected existing licensees. In relevant part, Section 94.15(b)(2) provides, "if the potential interference is to exceed that prescribed by § 94.63, [an applicant must submit] a statement to the effect that *all parties* affected have agreed to accept the higher level of interference."[15] In adopting this provision, the Commission stated that its purpose is to permit licensees and short-spacing applicants to "agree *between themselves* to values of protection less than those [the Commission has] specified."[16] Both of these statements are contrary to the interpretation of Section 94.15(b)(2) urged by Cross Country. Cross Country's interpretation focuses only on the potential level of interference resulting from its proposed short-spaced operations; it ignores the requirement that all parties must agree. In the instant case, United and Microband are the sole parties having an agreement. The fact that the inter-

ference to be caused by Cross Country's proposed system is technically similar to the potential interference resulting from Microband's proposed operations is irrelevant. United never agreed to accept any interference caused by Cross Country, nor have United and Cross Country executed any sort of a short-spacing agreement *between themselves*.

7. We also find unpersuasive Cross Country's contention that the existence of United's exclusive agreement with Microband is an impermissible reason for the withholding of United's consent. Our rules do not require licensees to negotiate with all parties seeking to commence operations within their protected service areas.[17] Quite to the contrary, rules such as Section 94.15(b) that protect existing stations from interference bestow upon licensees basic rights that they are not required to surrender. If a licensee is, however, amenable to less protection, it may, subject to Commission approval, negotiate an arrangement with a short-spaced applicant.[18] Significantly, a licensee's decision to forego some of its protection by executing a short-spacing arrangement with one applicant does not invalidate the protection afforded to it under the Commission's Rules with respect to other applicants.[19] Such a result would injudiciously penalize the affected licensee and initial short-spacing applicant by allowing subsequent applicants to exploit the expenses and efforts put forth by these parties in the negotiation process.[20]

8. Moreover, the requirement that each short-spacing applicant obtain the actual consent of affected licensees plays an important role in the licensing process by ensuring that the relevant licensees themselves consider the applicant's proposed operations compatible with their own. If applicants were permitted to short-space by implied consent, as suggested by Cross Country, the Commission would find itself in the untenable position of having to determine whether an applicant's proposal and qualifications would be acceptable to a particular licensee despite the fact that the applicant's proposed operations fail to satisfy the Commission's own standards. A scheme of this nature would likely involve the Commission in numerous post-licensing disputes, severely constraining already overburdened resources.

9. Finally, we are also unpersuaded by Cross Country's contention that Exhibit A of its application should have been interpreted as a request for waiver. It is well settled that applications that fail to satisfy the Commission's rules, and that consequently can be granted only by virtue of a waiver, will be dismissed if not accompanied by a waiver request.[21] A thorough examination of Cross Country's application clearly reveals that nothing therein can be construed as a request for waiver.[22]

10. For these reasons, we conclude that the application for Channel H-3 in New York City submitted by Cross Country Telecommunications, Inc. was not received in a condition acceptable for filing and was properly dismissed.

IV. ORDERING CLAUSES

11. Accordingly, pursuant to Sections 0.131(a), 0.331 and 1.106(a) of the Commission's Rules, 47 C.F.R. §§ 0.131(a), 0.331, 1.106(a), and in view of the discussion above, IT IS ORDERED THAT:

(1) The Petition for Reconsideration filed by Cross Country Telecommunications, Inc., File No. 753074, IS HEREBY DENIED.

(2) The Licensing Division shall take action to grant the license application of Microband Wireless Cable of New York, Inc., File No. 751808, for Channel H-3 in the New York City area.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker, Deputy Chief
Private Radio Bureau

FOOTNOTES

[1] Cross Country Telecommunications, Inc., Petition for Reconsideration (September 28, 1989) [hereinafter Petition].

[2] Letter from Michael B. Hayden, Chief, Microwave Branch, Licensing Division, Private Radio Bureau, to Cross Country Telecommunications, Inc., File No. 753074 (August 28, 1989).

[3] *See* Public Notice, Private Radio Bureau Lifts Freeze on Applications for the 2.5 GHz H-Group Channels. (November 17, 1988).

[4] Under the Commission's rules, all mutually exclusive applications received within a specified filing window in a condition acceptable for filing compete on an equal basis in a lottery. 47 C.F.R. § 1.972. Applications for point-to-multipoint operations are considered mutually exclusive if they propose co-channel stations to be located within 50 miles of each other. Similarly, new stations must be located at least 50 miles from existing co-channel point-to-multipoint stations. *See* Public Notice, Selection Process for 2.5 GHz OFS Licensees, 50 Fed. Reg. 6992 (February 19, 1985). If a new station is to operate on the same channel as one of several grandfathered point-to-point stations located on the H-channels, the standard for mutual exclusivity is whether the new station would offer the existing station a 90 dB carrier-to-interference (C/I) ratio. *See* 47 C.F.R. § 94.63(d)(3)(i). Cross Country's proposed system would, therefore, be mutually exclusive with Microband's proposed system and United's existing system.

[5] Microband Wireless Cable of New York, Inc., Application for Station Authorization, File No. 751808 (June 8, 1989). Pursuant to Section 94.15(b), applicants for use of OFS frequencies are required to submit an engineering analysis showing the potential for interference between the proposed facilities, previously authorized facilities and pending applications. H-channel applicants may satisfy this requirement by demonstrating that they have complied with the required mileage separation or interference criteria (50 miles or 90 dB, depending on the omnidirectional or point-to-point nature of the affected licensee). *See* 47 C.F.R. § 94.15(b)(1). Alternatively, applicants may show that, although they would not be operating in accordance with the prescribed criteria, all parties have agreed to accept the higher level of interference resulting from their operations. *See* 47 C.F.R. §§ 94.15(b)(2), 94.63.

[6] Public Notice, Mimeo No. 1488 (June 23, 1989).

[7] *See* Petition at 4.

[8] Cross Country Telecommunications, Inc., Application for Station Authorization, File No. 753074 (July 24, 1989).

[9] *See* Cross Country Telecommunications, Inc., Application for Station Authorization, File No. 753074, Engineering Statement at 1 and Exhibit 2 at 1-2.

[10] Letter from Michael B. Hayden, Chief, Microwave Branch, Licensing Division, Private Radio Bureau, to Cross Country Telecommunications, Inc., at 1.

[11] *Id.* The Licensing Division mistakenly cited to the 50-mile separation criterion rather than the 90 dB C/I ratio in the Dismissal Letter. This error is immaterial, however, because Cross Country did not rely on the 50-mile standard; rather, both Cross Country and Microband relied on the consent provision of Section 94.15(b)(2). Because the 50-mile criterion is inapplicable to the controversy in this proceeding, we need not address Cross Country's various procedural challenges to the validity thereof. *See* Petition at 6-7. We also note that it is clear that due to the proximity of United's existing station, terrain conditions, and propagation characteristics, Cross Country could not satisfy the 90 dB C/I ratio, *see* Petition at 11 n. 9.

[12] Also before us are a Joint Opposition filed by United and Microband and a Reply filed by Cross Country. *See* United Airlines, Inc. and Microband Wireless Cable of New York, Inc., Joint Opposition to Petition for Reconsideration, File No. 753074 (October 11, 1989); Cross Country Telecommunications, Inc., Reply to Opposition to Petition for Reconsideration, File No. 753074 (October 18, 1989).

[13] Petition at 8.

[14] Petition at 11 n. 9.

[15] 47 C.F.R. § 94.15(b)(2) (emphasis added).

[16] Report and Order, Docket No. 19869, 52 FCC 2d 894, 901-02 (1975) (emphasis added).

[17] Contrary to Cross Country's assertions, exclusive agreements such as that executed between United and Microband are not inconsistent with Section 1.227(b)(4) of the Commission's Rules, 47 C.F.R. § 1.227(b)(4) (providing for a 30 day filing window for competing applications). The filing window discussed in Section 1.227(b)(4) applies only to those applications received "in a condition acceptable for filing." 47 C.F.R. § 1.227(b)(4). Similarly, we reject Cross Country's argument that exclusive agreements such as that entered into between United and Microband are contrary to 47 C.F.R. § 94.15(b)(3). Section 94.15(b)(3) requires licensees to share technical information with all applicants. The purpose of this rule is to ensure that applicants will have the technical information needed to determine whether interference their proposed operations will cause to the existing station will be within the established levels. Section 94.15(b)(3) does not require licensees to accept higher levels of interference than prescribed in the Commission's Rules nor does it require licensees to share the terms of their contracts with third parties.

[18] Cross Country argues that allowing an existing licensee such as United to assess the qualifications of applicants seeking a short-spacing authorization constitutes an unlawful delegation of the Commission's statutory obligation to license frequencies in the public interest. Petition at 11 n. 8. Significantly, however, our interpretation of Section 94.15(b)(2) does not delegate to private parties veto power over otherwise acceptable license applications. Rather, our interpretation merely provides licensees an opportunity to concur to an application that would not ordinarily meet our licensing standards. The Commission retains the power to approve or disapprove of the application independent of the licensee's decision.

[19] *See* Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (upholding state statute which requires a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee only if that existing franchisee protests the establishment of the proposed competing dealership).

[20] *See* In re Southern Florida Broadcasting Co., 99 FCC 2d 840, 848 (1984) ("To permit subsequent applicants [in the FM broadcast context] to merely 'assume' a competing optionee's site or a right of succession would put a costly premium on being the first to secure a site and would perversely penalize the prudent.")

[21] *See* 47 C.F.R. § 94.33(c).

[22] Under 47 C.F.R. § 94.33(c), a waiver request is one that asks for an exception to a rule in conflict. Cross Country's assertion of compliance with our Rules does not ask for an exception to a rule in conflict but rather simply asserts that no conflict exists. Furthermore, a waiver applicant is required to describe the nature of the exception desired and to set forth reasons in support thereof, including a showing that unique circumstances exist justifying the waiver request. 47 C.F.R. § 94.33(c). Cross Country's application does neither.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 29, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PETITION FOR WAIVER OF PART 69 TO PROVIDE OPTIONAL 800 DATA BASE ACCESS SERVICE

On June 4, 1991, Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Part 69 of the Commission's rules to permit the establishment of new rate elements to recover the costs of providing Optional 800 Data Base Access Service.

Bell Atlantic proposes to introduce limited portability for 800 numbers in its service area. That is, customers will be able to change carriers while keeping the same 800 number. Bell Atlantic states that it will employ a data base that will identify the 800 carrier for each of the individual 800-NXX-XXXX numbers in the twenty 800-NXX codes dedicated to this service. Bell Atlantic states that since it can change the 800 carrier designated in the data base, these particular 800 numbers will now be portable. Bell Atlantic states that this will increase competition in the provision of 800 services. Bell Atlantic states that the Optional 800 Data Base Access Service will permit more efficient use of 800 numbers because each of the individual 800 numbers in the twenty codes available for this service can be assigned to any 800 carrier, thereby reducing the risk that 800 numbers will be exhausted.

Bell Atlantic states that the 800 Data Base Access Service will employ three new unbundled rate elements. Bell Atlantic states that it will assess a recurring "Query Charge" each time a query is sent to the 800 Data Base to seek routing information for an 800 call. Bell Atlantic states that it will assess a nonrecurring charge each time a customer requests that a particular ten-digit 800 number in one of the twenty codes available with this service be reserved for its use. Bell Atlantic states that it will also assess a nonrecurring charge for a "Build/Change/Disconnect Charge" when customers request new service, modifications in their service, or disconnection.

Interested parties should file comments on the petition by **August 26, 1991,** and reply comments by **September 10, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONELINK INC. File No. I-T-C-91-124

Application for authority to operate
as an international resale carrier.

ERRATUM

Released: July 29, 1991

By the Chief, International Facilities Division:

1. In an Order released July 17, 1991 (DA 91-869), the Paragraph 2 should read as follows: Accordingly, IT IS ORDERED that Application File No. I-T-C-91-124 IS GRANTED and Phonelink, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell's AAD 91-47
Permanent Cost Allocation
Manual for the Separation of
Regulated and Nonregulated Costs

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1991; Released: July 30, 1991

By the Chief, Common Carrier Bureau

I. INTRODUCTION AND BACKGROUND

1. On October 31, 1990, Pacific Bell (Pacific) filed revisions to its permanent cost allocation manual (CAM) which is used for allocating costs between its regulated and nonregulated activities. Pacific proposes several changes to its salary and wage procedures, its descriptions of transactions with affiliates and its cost allocation methods. The People of the State of California and the Public Utilities Commission of the State of California (California) filed comments relating to cost allocation procedures for Bellcore projects and to Pacific's internal practices governing nonregulated marketing employee time reporting and record retention. Pacific filed a reply. We have reviewed Pacific's revisions and the applicable pleadings and will allow the revisions.

2. In the *Joint Cost Order*,[1] the Commission required Tier 1 carriers [2] to file manuals to separate the costs of regulated telecommunication services from the costs of nonregulated activities. The manuals describe the carriers' nonregulated activities, list the activities they treat as incidental activities, and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. Pacific filed its initial manual on September 1, 1987. It has filed revisions pursuant to two Bureau Orders[3] and has subsequently filed routine quarterly updates. [4]

II. ANALYSIS OF PACIFIC BELL'S PROPOSAL AND CALIFORNIA'S COMMENTS

3. In its October 31, 1990, revisions, Pacific proposes to add job function codes to the cost pool identification basis of Account 6532, Network administration expense, and to add a new subaccount in the cost pool allocation method for Account 6533, Testing expense. Pacific also proposes revisions and clarifications to its time reporting procedures. In addition to these changes, Pacific proposes deletions, additions and clarifications in its descriptions of services provided to or by several corporate affiliates. As part of its affiliate transactions revisions, Pacific proposes to add "Corporate Budgets" to the types of services provided by Pacific to its nonregulated affiliates. According to Pacific, corporate budget services involve payment arrangements for the sharing of Bellcore project information received by Pacific. Pacific proposes to provide this service on an ongoing basis.

4. In its comments, California states that Pacific fails to furnish detailed information on its proposal to provide corporate budget services to affiliates for the sharing of Bellcore information. California argues that, in order to provide more meaningful data, Pacific's cost allocation manual must explain the following: (1) the specific Bellcore services or project information which Pacific intends to provide to its nonregulated affiliates; (2) the arrangements between Pacific and its nonregulated affiliates with respect to the sharing of Bellcore project information, including the terms and conditions for access to such information; and (3) the method(s) employed to determine the charges assessed by Pacific to its nonregulated affiliates. [5] California believes that Pacific should clarify whether its affiliates bear the risks and costs of developing a new Bellcore service, or whether its affiliates are allowed to purchase the service after its availability without bearing these risks and concomitant costs. California argues that there is no indication of whether Pacific's affiliates are obliged to bear the risks and costs for a service which proves unsuccessful. [6]

5. California notes that Bellcore engages in research on broadband ISDN, laser technology, and many other new information services which are of value to Pacific's nonregulated affiliates. California believes that these affiliates should share the risks and costs of Bellcore project development along with ratepayers of Pacific's regulated operations who would otherwise bear a percentage of these costs alone. In addition, California believes that Pacific should clarify that charges to its nonregulated affiliates for services provided by Bellcore shall be based on the market price that would be charged to any nonregulated entity purchasing the same goods and ser-

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[1] Separation of Costs of Regulated Telephone Service from Cost of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Circ. 1990).

[2] A Tier 1 carrier is defined as a local exchange carrier that earns more than $100 million in total company regulated annual revenues. *See* 1984 Annual Statistical Volume II of USTA Statistical Reports of Class A & B Telephone Companies for the year 1983.

[3] *See*, Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (Com. Car. Bur. 1988) (*Nevada and Pacific Order*); and Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081 (Com. Car. Bur. 1988) (*Nevada and Pacific Revision Order*).

[4] The *Nevada and Pacific Order* defines the type of changes to the Pacific cost manual that should be submitted quarterly, on March 31, June 30, September 30, and December 31 of each year.

[5] California Comments at 2.

[6] *Id.* at 2-3.

vices from Bellcore. California notes that it has adopted this pricing method for Pacific's affiliate transactions. According to California, this method would equalize the relationship that Bellcore has with nonregulated affiliates of Pacific and unaffiliated entities and reduces the opportunity for Pacific to fund Bellcore activities which primarily benefit its nonregulated affiliates and not its local exchange operations. [7]

6. California also questions Pacific's current practice of allowing joint marketing personnel to retain possession of their time sheets until completion of the annual attest audit. California claims that no internal accounting controls are specified to ensure that these records are accurately kept and independently scrutinized. California urges the Commission to require Pacific to revise its CAM to prescribe specific internal accounting controls which would allow for review and retention by separate personnel of the records of all cost allocations made by marketing personnel. Finally, California argues that these underlying supporting documents should be retained for one calendar year after the annual attest audit is completed and an independent accountant's opinion is rendered instead of allowing Pacific to destroy these records after the issuance of the annual attest audit report.[8]

7. Pacific disagrees with California's claim that additional detail is necessary for shared Bellcore services or project information which Pacific should be billing to its nonregulated affiliates. Pacific states that its proposed change will properly recover costs in the limited instances where it shares Bellcore information with its nonregulated affiliates. It claims that Pacific Telesis's policy generally prohibits sharing proprietary Bellcore information between Pacific and its nonregulated affiliates. It states, however, that limited sharing is permitted for cooperative responses to litigation and regulatory proceedings, for joint marketing activities authorized by regulators, and with the holding company for use in its corporate governance function. Any other sharing of proprietary information is restricted, requires officer approval, and the execution of a nondisclosure agreement which must be provided to California. Pacific claims usage is restricted to the purpose for which approval was obtained. Pacific emphasizes that all information, whether proprietary or nonproprietary, when requested by an affiliate, is shared pursuant to a written contract and to charges based on the pricing guidelines which comply with state and federal cost allocation requirements. Pacific contends that, given the limited extent of information sharing, requiring the CAM to describe specific projects or services to be shared by Pacific is unwarranted and would involve a level of detail that the Commission has not found necessary in the past. [9]

8. Pacific refutes California's contention that the cost of shared Bellcore services or projects should be billed to nonregulated affiliates at market price. Pacific explains that the price charged by Bellcore to Bellcore's other customers is not an allowable basis for determining Pacific's charges to its affiliates for Bellcore shared services. Pacific cites the Commission's affiliate transaction rules, [10] which require that a carrier charge its nonregulated affiliates fully distributed costs for services in the absence of a tariffed price. Pacific states that the only exception permits the use of a prevailing price list when Pacific also provides the service to nonaffiliates. Pacific notes that fully distributed costs should be used to determine charges to affiliates, unless otherwise specified. Pacific also disagrees with California's contention that all its affiliates should share with the ratepayer the risks and costs of developing a new Bellcore service. Pacific states that risk sharing should require sharing the rights and privileges of ownership; nonaffiliated recipients of Bellcore information do not now share Bellcore's risks.[11]

9. Finally, Pacific argues that the Commission should reject new recordkeeping requirements. Pacific claims that California should have raised this issue in the *Joint Cost* proceeding and that the time for reconsideration has long expired. According to Pacific, California's recommendation related to time reporting and recordkeeping is based on invalid assumptions. Pacific claims that the Commission's *Joint Cost Order* specifies internal controls and, as California admits, independent scrutiny is provided each year by the attest audit. Pacific states that this scrutiny will be further heightened in 1990, when the independent auditors are required to perform additional work in examining source data. Moreover, Pacific maintains that the level of detail urged by California would be so cumbersome that it would obscure the primary purpose of the CAM, *i.e.* the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[12] Finally, Pacific states that the Commission has found a one year record retention period to be sufficient.

III. DISCUSSION

10. We conclude that Pacific's October 31, 1990, cost manual revisions not specifically addressed by California are consistent with the Commission's cost allocation rules and policies and are, therefore, acceptable. We also conclude that Pacific's revisions related to billing for Bellcore projects are acceptable. Finally, we conclude that Pacific need not make any changes related to its time reporting and recordkeeping at this time.

11. California's contention that more detail is needed as to specific Bellcore services or project information which Pacific intends to provide to its nonregulated affiliates appears to have merit, but current CAM procedures do not require that detailed information of this type be filed on affiliate transactions. At the present time, therefore, we believe that Pacific's CAM meets the Commission's requirements. Nevertheless, as part of its efforts in the *Computer III Remand Proceedings*, the Commission is evaluating whether several proposed measures would improve the CAM process.[13] California's suggestions would be more appropriately evaluated in that context.

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[7] *Id.*
[8] California Comments at 3 and 4.
[9] Pacific Reply at 3.
[10] 47 C.F.R. §§ 64.902 and 32.27.
[11] Pacific Reply at 5 and 6.
[12] *Id.* at 9.
[13] *See Notice of Proposed Rule Making and Order*, Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174, 176-79 (1990).

12. With respect to California's suggestions for time keeping review and new recordkeeping requirements, we believe that the Commission's ongoing audits of time reporting, as well as the independent auditors' CAM audits, provide an adequate review of time reporting. We also believe that current recordkeeping requirements, as they relate to the CAM, are sufficient to allow the Commission to meet its responsibilities under its current rules. Previously, the Commission rejected California's suggestion for additional record retention requirements in the *Joint Cost Order*,[14] and established the one-year period. Therefore, we will not require Pacific to make any changes to its time keeping or record retention procedures. Finally, we note that, notwithstanding the recordkeeping requirements of this Commission, there is nothing to preclude California from imposing additional recordkeeping requirements to meet its needs.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154 (i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. § 0.91, 0.291, that the revisions filed October 31, 1990, by Pacific Bell ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief Common Carrier Bureau

[14] *Joint Cost Order*, 2 FCC Rcd at 1322.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-204

In re Applications of

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT — File No. BRH-900131UA

For Renewal of License of Station KUCB-FM, Des Moines, Iowa

and

IOWA ACORN BROADCASTING CORPORATION — File No. BPED-900102MB

For a Construction Permit for a New FM Station Des Moines, Iowa

MINORITY COMMUNICATIONS, INC. — File No. BPED-900116MA

For a Construction Permit for a New FM Station Des Moines, Iowa

HEARING DESIGNATION ORDER

Adopted: June, 28, 1991; Released: July 30, 1991

By the Commission

1. The Commission has before it for consideration: (a) the application of the Center for Study and Application of Black Economic Development (the Center) for renewal of license of Station KUCB-FM, Des Moines, Iowa, and (b) the applications of Iowa Acorn Broadcasting Corporation (Acorn) and Minority Communications, Inc. (Minority) for a construction permit for a new FM station on Channel 207C at Des Moines, Iowa. All three applications are mutually exclusive because KUCB-FM is currently licensed to operate on Channel 207C.[1]

2. By way of background, on February 26, 1979, the Commission granted a construction permit to the Center for a new 10-watt, educational station on Channel 207, Des Moines, Iowa (File No. BPED-2622). Subsequently, the Center applied for call letters KUCB, and submitted an ownership report to the Commission, dated May 30, 1979. The ownership report, which was signed by Linda Hardnett, as Chairman of the Board of Directors, listed nine directors, and identified four officers. On April 16, 1980, the Commission granted the Center's application for a modification of its construction permit to specify a new transmitter site and main studio location for Station KUCB-FM (File No. BMPED-790815AO). On June 5, 1980, the Commission granted another application for modification of the Center's construction permit for an increase in effective radiated power to five kilowatts (File No. BMPED-790815AA). As part of its application to increase power, the Center submitted a January 9, 1980, statement of publication, signed by "Dr. Charles Knox, Consultant." Knox was not among the 13 principals listed previously.

3. In 1981 the Center sought yet another construction permit modification for a new transmitter site. This modification was granted on July 24, 1981 (File No. BMPED-810323AN). On that same date, the Center, by its "legal consultant," Knox, requested special temporary authority to operate at 10 watts power. The FM Branch denied this request on July 30, 1981. Knox identified himself as a "Vice President" in a September 30, 1982, letter to the Commission concerning equipment tests to be conducted by the station.

4. On July 28, 1982, the Commission granted the Center an extension of time for construction until January 28, 1983 (File No. BMPED-820707AD). The permit expired, however, without construction having been completed and without any additional requests for extension having been filed by the Center. On March 24, 1983, Commission personnel inspected the station and found numerous technical violations. The Commission sent a notice of violation to the Center on April 6, 1983. Thereafter, the Commission reinstated the station's construction permit on October 18, 1983, with an expiration date of April 15, 1984 (File No. BPED-830919AO). However, another extension was requested by Mr. Knox and was granted on April 23, 1984, for a period ending October 24, 1984 (File No. BMPED-840412AE).

5. Finally, on October 29, 1984, the Center filed its application for a station license (BLED-841029CY). Immediately thereafter, however, the FM Branch inquired about technical problems in the license application. Charles Knox, now listed as President, responded on December 10, 1984.

6. In 1985 KUCB-FM operated pursuant to program test authority. After receiving complaints of interference, the Commission conducted a second inspection of the station on January 7, 1986, and, on March 6, 1986, issued a notice of apparent liability, for a $4,700 forfeiture for various technical violations. On April 11, 1986, a third inspection was conducted to determine whether the violations had been corrected. However, new and continued technical violations were found, and the Commission issued another notice of apparent liability for a $2,000 forfeiture on June 3, 1986. The Center failed to pay either forfeiture. On June 19, 1986, Iris Ward, on behalf of the Center, notified the Commission that the station was going off the air for 30 days. Then, on August 26, 1986, the station's attorney, Alfredo Parrish, responded that the station would be unable to take any action in connection with the forfeitures until the board of directors met. On October 6, 1986, Parrish orally requested the Commission to reduce the two forfeitures. The Commission conducted a fourth inspection of the station on October 8, 1986, and found additional and continued technical violations.

7. By a May 18, 1987, letter, the Commission requested the Center to provide a detailed explanation as to the station's technical violations. The letter also informed the Center that a failure to respond could result in the revocation of program test authority. Mr. Ako Abdul-Samad responded on behalf of the station as "Vice President," stating that "KUCB is under new management," and that the station would respond further by July 1, 1987. The Center did so on July 31, 1987. In its response, the Center addressed some of the Commission's questions regarding technical violations, and attached an Ownership Report. The Ownership Report was unsigned, and only listed a single individual: Charles Knox as the Center's "President." Also, it was stated that Mrs. Iris Ward was no longer a member of the Board of Directors.

8. On September 14, 1987, the Commission received a letter from the Commonwealth Electric Company, stating that the company was "trying to locate the responsible person in charge of a local radio station. KUCB . . . is no longer on the air . . . ." By a March 19, 1988, letter, a Jamal Long, "Acting Executive Director and Board Member" advised the Commission that KUCB-FM would be off the air for 60 days while it attempted to correct a technical problem. However, Long did not request permission to go silent.

9. On June 24, 1988, the Center's license application (BLED-841029CY), was granted. After the grant of the license, however, on October 29, 1988, the licensee advised the Commission that it would be off the air for 120 days due to technical problems with its transmission system. On November 23, 1988, the Commission sent correspondence to the station requesting a more detailed description of the problems before ruling on the special temporary operating authority (STA) request. In a January 4, 1989, response, the licensee merely stated that the technical problems that formed the basis for its STA request had been corrected. In view of the foregoing, the October 29, 1988, STA request was not granted.

10. The Commission's staff has received information from several sources that the station has been off the air during the license period, without authorization, and has been evicted from its facilities for failure to pay rent. On March 8, 1989, Commission personnel visited KUCB-FM's tower/transmitter site and studio location and found no one at either site. During the period April 17-24, 1989, Commission personnel revisited the site and reported that the studio building appeared deserted and that electrical power lines running to the building had been disconnected. The transmitter location also appeared deserted. The electrical power meter for the trailer at the transmitter had been removed and the electrical power lines running to the site had been cut.

11. Thus, for an eleven-year period following the grant of its construction permit in 1979, KUCB-FM operated either sporadically, improperly or not at all. Furthermore, the licensee has not received Commission authorization to remain silent at any time. Nor has it turned in its license.[2] Therefore, the licensee has been in apparent willful and repeated violation of Section 73.561 of the Commission's Rules. [3] Accordingly, an appropriate issue will be specified, as well as an ineptness issue since the Center's eleven-year track record discloses a pattern of carelessness and inadvertence regarding matters of major significance. *See George E. Cameron Jr. Communications*, 67 FCC 2d 143 (1977).

12. Notwithstanding the Center's apparent failure to operate the station in accordance with the Commission's Rules, the licensee filed an untimely application for the renewal of KUCB-FM's license on January 31, 1990.[4] The renewal application was completed by Jamal Long, who listed his title as "Vice President." In response to Question 6, the licensee answered "no" to whether any adverse finding had been made against the licensee or any parties thereto in a civil or criminal proceeding since the filing of its last major application. Information has come to the attention of the Commission, however, that Charles Knox, who is listed in the renewal application as the Center's "President," was convicted in 1987 in the United States District Court for the Western District of Texas of two felony counts of impersonating an attorney in order to visit a federal prisoner, in violation of Title 18, United States Code, Section 1001. Also, Knox was convicted in 1987 in the United States District Court for the Northern District of Illinois of three additional felony counts of conspiracy, racketeering, and embezzlement/theft. None of these convictions was disclosed by the Center to the Commission. Therefore, appropriate issues will be specified.

13. The Commission's records indicate that the Center filed only three ownership reports. The first was dated May 30, 1979, and listed Linda Hardnett as "President" and identified 13 board members; a second dated May 23, 1987, listed only Charles Knox as "President"; and a third dated January 22, 1990, which was filed along with KUCB-FM's renewal application, listed five officers, and no directors, including "President" Charles Knox. However, in a June 1, 1990, amendment to the renewal application, Wayne Ford is listed as "President," and only two of the previous five officers remain. Moreover, only one of the original 13 principals as of 1979, Jamal Long, remains as of June 1990. Section 73.3615(f) of the Commission's Rules requires that all licensees and permittees must file a supplemental Ownership Report within 30 days of any change in the information reported in the previous report. The information available to the Commission indicates that the Center has failed to do so. Furthermore, in its eleven-year history of existence, KUCB-FM never sought or received Commission approval for a transfer of control. Accordingly, appropriate issues will be specified.

14. On January 8, 1990, the Commission adopted an *Order to Show Cause and Notice of Apparent Liability*, FCC 90-3, whereby, pursuant to Section 312(a)(3) and (a)(4) of the Communications Act of 1934, as amended, a hearing was to be held to determine whether the Center's license for KUCB-FM should be revoked for violating Section 73.561 of the Commission's Rules. However, on January 2 and 16, 1990, before the Commission's aforementioned *Order* could be released, Acorn and Minority filed their respective applications for a construction permit on Channel 207C. Shortly thereafter, on January 31, 1990, the Center filed its application for license renewal. In view of the filing of these mutually exclusive applications, the Commission believes that the appropriate vehicle for examining the above-referenced issue against the Center is the instant Hearing Designation Order, which also encompasses the Center's renewal application and the competing applications of Acorn and Minority. Also, since January 8, 1990, additional facts which have come to the Commission's attention warrant specification of

additional issues against the Center, as set forth below. Accordingly, the January 8, 1990, *Order*, will be rescinded.

15. Acorn proposes to locate its antenna on a 17-foot (5.2 meter) tower to be constructed atop The Financial Center, a building in Des Moines, at coordinates 41° 35' 09" North Latitude, 93° 37' 30" West Longitude. However, the Commission's records show the presence of a taller structure existing at these same coordinates. Whereas the applicant's structure and building would total 97 meters above ground level (AGL) and 343 meters above mean sea level (AMSL), the Commission's records show a structure 119.5 meters in height AGL and 361.8 meters AMSL. Consequently, Acorn must amend its application within 30 days of the release of this Order to eliminate the noted discrepancy.

16. Both Acorn and Minority are basically qualified to construct and operate their proposed stations. Because these two applications, along with the license renewal application of the Center, are mutually exclusive, IT IS ORDERED, that pursuant to Title 47, United States Code, Section 309(e), the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether the Center for Study and Application of Black Economic Development has been inept in its operation of Station KUCB-FM since 1979;

(b) To determine whether the Center for Study and Application of Black Economic Development violated Section 73.561 of the Commission's Rules;

(c) To determine whether the Center for Study and Application of Black Economic Development misrepresented material facts to, and/or concealed material facts from, the Commission in connection with its answer to Question 6 of its instant license renewal application;

(d) To determine the current ownership and composition of the Center for Study and Application of Black Economic Development and the ownership and composition during the license term, including the role and participation of Charles Knox, and the effect thereof on the Center's basic qualifications to be a Commission licensee;

(e) To determine whether control of the Center for Study and Application of Black Economic Development was transferred without Commission approval, or exercised by persons not authorized to do so, in violation of Section 310(d) of the Communications Act of 1934, as amended;

(f) To determine whether the Center for Study and Application of Black Economic Development made any misrepresentations to the Commission or lacked candor with the Commission as to the true officers and directors of the permittee and licensee, and whether the Center violated Section 73.3615 of the Commission's Rules;

(g) To determine, in light of the evidence adduced pursuant to issues (a) through (f), *supra*, whether the Center for Study and Application of Black Economic Development is basically qualified to be a Commission licensee;

(h) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(i) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

17. IT IS FURTHER ORDERED, That the burden of proceeding and burden of proof on Issues (a) through (g) shall be on the Center; and

18. IT IS FURTHER ORDERED, That the *Order to Show Cause and Notice of Apparent Liability*, FCC 90-3, adopted January 8, 1990, IS HEREBY RESCINDED; and

19. IT IS FURTHER ORDERED, That Acorn shall submit a clarifying amendment, pursuant to paragraph 15, above, within 30 days of the release of this Order, to the presiding Administrative Law Judge.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554; and

21. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission Rules, in person or by attorney, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a WRITTEN NOTICE OF APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*; and

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note that there are several pending matters of which the parties to this proceeding should be aware. First, KUCB(FM) has pending a minor change construction permit application, File No. BPED-900531IA, which seeks to increase antenna height above average terrain, decrease effective radiated power, change transmitter location and change Class from C2 to C3 (pursuant to MM Docket 88-375). However, this minor change

application has not been associated with this proceeding since it was filed after the window period triggered by KUCB(FM)'s renewal application. Second, KWDM(FM), West Des Moines, Iowa, has a pending petition for reconsideration, filed May 4, 1990, contesting the April 2, 1990, return of their major change construction permit application, File No. BPED-860917MH. If this petition for reconsideration is granted, KWDM(FM)'s application will be in conflict with both KUCB(FM)'s application and Minority Communications, Inc.'s application, BPED-900116MA. Accordingly, if KWDM(FM)'s petition for reconsideration is granted, KUCB(FM), Minority Communications, Inc. and KWDM(FM) will be given an opportunity to amend their applications to eliminate the conflict. If the conflict cannot be resolved by amendment, then the application of KWDM(FM) will be included in this proceeding by issuance of a supplemental hearing designation order.

[2] Instead, on May 30, 1990, the Center, by its "President," Wayne Ford, filed an STA request to change transmitter sites. On May 31, 1990, the Center filed an application for a construction permit to change its transmitter site and to increase height above average terrain. The construction permit application is pending with the Bureau, but the Bureau granted the STA request on July 11, 1990, without prejudice to whatever action would be taken in connection with the renewal application. In a June 29, 1990, letter to the FM Branch, the Center stated that it was "currently operating."

[3] Section 73.561(a) and (d) of the Commission's Rules provide, in pertinent part:

> (a) All noncommercial educational FM stations will be licensed for unlimited time operation except those stations operating under a time sharing arrangement. All noncommercial educational FM stations are required to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week; however, stations licensed to educational institutions are not required to operate on Saturday or Sunday or to observe the minimum operating requirements during those days designated on the official school calendar as vacation or recess periods.
>
> * * * * *
>
> (d) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraphs (a) and (b) [which deals with time sharing] of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the Commission, *Provided*, That notification is sent to the Commission in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the permittee or licensee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30-day period, the permittee or licensee will so notify the Commission in Washington, D.C., of this date. If the causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 30th day for such additional time as may be deemed necessary.

[4] Section 73.3539 of the Commission's Rules required the renewal application to be filed by October 1, 1989, or four months before the license's expiration on February 1, 1990. However, in view of the Center's January 31, 1990, filing, and the lack of prejudice to any other party, the Center's late-filed application will be accepted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-421

In re Applications of

SCIOTO BROADCASTERS, LIMITED PARTNERSHIP — File No. BPH-870515MU

MID-OHIO RADIO LIMITED — File No. BPH-870515NM

HORACE E. PERKINS — File No. BPH-870515NP

For a New FM Station on
Channel 298A, Columbus, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; Released: July 30, 1991

By the Commission:

1. In an Order, *Scioto Broadcasters, Limited Partnership*, 6 FCC Rcd 1893 (1991), the Commission denied an application for review filed by Mid-Ohio Radio Limited (Radio). Now before the Commission are a petition for reconsideration filed May 6, 1991 by Radio, an opposition filed May 16, 1991 by Horace E. Perkins (Perkins), a reply filed May 29, 1991 by Radio, and a motion to strike the reply filed June 4, 1991 by Perkins.

2. Radio's petition for reconsideration is procedurally deficient and will be dismissed.[1] A petition for reconsideration of the Commission's denial of an application for review will be entertained only if one or more of the following circumstances is present:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

47 C.F.R. § 1.106(b)(2).

Radio fails to present new facts or changed circumstances as required by Section 1.106(b)(2).

3. Moreover, Radio continues to argue, as it did in its application for review, that summary decision on the financial issue was improperly granted since Perkins should not have been relieved of the need to establish the validity of his initial financial proposal by substituting a new proposal which relies on financing arranged after designation. In denying Radio's application for review, the Commission pointed out that Perkins filed a timely amendment of his financial proposal as a matter of right pursuant to 47 C.F.R. § 73.3522(b)(2), thus mooting any questions concerning the adequacy of Perkins' prehearing financial showing. *See* 6 FCC 2d at 1893 ¶ 2. To the extent that Radio's petition continues to argue that summary decision should not have been granted on the financial issue, it is repetitious. We therefore decline to consider this argument further, since reconsideration will not be granted to debate matters on which we have already deliberated and spoken. *WWIZ Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).[2] However, brief comment is warranted on Radio's assertion that the Commission's decision cannot be reconciled with certain case precedents.

4. We disagree with Radio's assertion that our decision in this proceeding directly conflicts with the Board's final decisions in *JAM Communications, Inc.*, 4 FCC Rcd 3754 (Rev. Bd. 1989), *George Edward Gunther*, 104 FCC 2d 1363 (Rev. Bd. 1986), and the Board's interlocutory order in response to a petition for extraordinary relief in *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990). We note, first, that the Commission did not review the Board's decisions in either *JAM* or *Gunther* and that the Board has not yet issued a final decision in *Phalen*. Moreover, none of the applicants whose financial qualifications were at issue in *JAM, Gunther* or *Phalen* was entitled to amend its application as a matter of right in response to an issue first raised in the hearing designation order. Consequently, we believe that the precedent cited by Radio has no applicability to the facts presented here.

5. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed May 6, 1991 by Mid-Ohio Radio Limited IS DISMISSED.

6. IT IS FURTHER ORDERED, That the Motion to Strike filed June 4, 1991 by Horace E. Perkins IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In light of our dismissal of Radio's petition for reconsideration, we will also dismiss as moot Perkins' motion to strike Radio's reply pleading.

[2] Likewise, Radio's renewed argument concerning the reduction in its quantitative integration credit, which our previous decision recognized as having no decisional significance in view of Perkins' clear qualitative superiority, need not be considered further.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-205

In re Applications of

Radio Lake Geneva Corporation (hereafter "RLGC")	File No. BPH-900611MG
Tom Kwiatkowski (hereafter "Kwiatkowski")	File No. BPH-900613MA
David A. Nelson (hereafter "Nelson")	File No. BPH-900613MB
Lake Geneva Broadcasting, Inc. (hereafter "LGBC")	File No. BPH-900614MA
Northwest Broadcasting Company (hereafter "Northwest")	File No. BPH-900606MG (Herein DISMISSED)
State Long Distance Telephone Company (hereafter "State")	File No. BPH-900612MB (Herein DISMISSED)

For Construction Permit
for a New FM Station
on Channel 241A (96.1 MHz)
in Lake Geneva, Wisconsin

HEARING DESIGNATION ORDER

Adopted: June 28, 1991; Released: July 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* A review of Northwest's application by the FM Branch engineering staff reveals that the proposal is short-spaced to a licensed facility, Class B Station WZTR(FM), Channel 239B, Milwaukee, Wisconsin, by 1.6 kilometers. The actual spacing to WZTR is 67.4 kilometers, whereas the required spacing pursuant to 47 C.F.R. Section 73.213 is 69 kilometers. The applicant recognizes this problem but asserts that its proposal meets the two-kilometer site restriction imposed in the rulemaking proceeding which created the Lake Geneva allotment. Nonetheless, the failure to meet the minimum distance separation requirement is fatal. Thus, Northwest's application must be dismissed and returned for failure to comply with Section 73.213.[1]

3. Our engineering study indicates that each of the applicants here failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment," (released January 24, 1986). Under the Commission's environmental rules, applicants must determine whether or not their proposals would have a significant environmental effect under the criteria set forth in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under these criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Furthermore, 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since RLGC, State, Kwiatkowski, Nelson, and LGBC failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. §1.1311. *See generally* OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, RLGC, State, Kwiatkowski, Nelson, and LGBC must each submit an EA to the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that any of the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

4. State was an applicant for a new FM station on Channel 283A, Whitewater, Wisconsin, in MM Docket No. 90-541. The predicted 3.16 mV/m contours of State's proposed facilities in Lake Geneva and Whitewater overlapped. In Exhibit 3 to its application in this proceeding, State asserted that it would withdraw its then-pending Whitewater application in order to insure that there would be no prohibited overlap and to comply with 47 C.F.R. Section 73.3555. Thereafter, state failed to divest and, subsequently, State's Whitewater application was granted, effective May 7, 1991. Accordingly, State's instant application must be dismissed for violation of the Com-

[1] Northwest did not request a waiver of Section 73.213.

mission's "duopoly" and inconsistent application rules, 47 C.F.R. §§ 73.3555(a)(2) and 73.3518. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987). *See also Harold J. Haley d/b/a Madison County Broadcasting*, reference 8920-PJR (Chief, Audio Services Division, February 3, 1984), *aff'd sub nom. Madisonville Media Company*, FCC 84-630, Mimeo No. 35404 (released December 18, 1984), *aff'd* 836 F. 2d 653 (D.C. Cir. 1988).

5. *Kwiatkowski.* Kwiatkowski amended his application to specify a 6 kW facility in lieu of the 3 kW facility originally proposed. An engineering staff examination of the application reveals that although the latest proposal would result in contour overlaps of 0.35 kilometers to Station KMJC(FM) at the 223 degree azimuth and of 0.41 kilometers to Station WBBM-FM at the 347 degree azimuth, the projected radiation to these existing facilities is exactly equivalent to the original 3 kW proposal. Thus, Kwiatkowski's application is in compliance with 47 C.F.R. Section 73.215.

6. *Nelson.* Northwest filed a petition to deny Nelson's application as insufficient for tender. Nelson filed an opposition to the petition, to which Northwest, in turn, submitted a reply. According to the petitioner, 47 C.F.R. Section 73.3566(a) mandates dismissal and return of the application, and 47 C.F.R. Section 73.3522(a)(6) prohibits a curative amendment. Northwest argues that Nelson's proposed transmitter site is short-spaced to Stations KMJC and WBBM using the minimum distance separation standards of 47 C.F.R. § 73.207. According to Northwest, since Nelson requests processing of his application pursuant to 47 C.F.R. Section 73.215, he must provide contour protection to all short-spaced stations, but Nelson proposes to provide the requisite protection only to KMJC(FM). Northwest asserts that Nelson erroneously seeks to apply the distance separation standards of 47 C.F.R. Section 73.213, under which his proposed facility would be short-spaced to KMJC but not to WBBM. Conceding that Nelson's application would not be objectionable if Section 73.213 processing had been requested, Northwest argues that the Commission's Rules are clear that the Section 73.207 separation standards apply when an applicant, such as Nelson, requests Section 73.215 processing. Nelson, noting that different spacing standards are set forth in Sections 73.207 and 73.213, argues that the more liberal separations of Section 73.213(c)(1) apply to all new stations or FM channel allotments made in response to rule making petitions to amend the Table of allotments filed prior to October 2, 1989, such as Channel 241A at Lake Geneva. According to Nelson, his proposal is not short-spaced to WBBM under Section 73.213 standards.

7. In a related matter, a copy of Northwest's original petition, filed May 25, 1990, was not served on Nelson. Subsequently, Northwest asserts, it discovered inaccuracies in certain contour values in its original petition, and it refiled "substantially the same" petition on January 11, 1991, prior to the January 14, 1991 deadline, this time serving Nelson. Nelson asserts that in light of these circumstances," serious questions" may arise concerning compliance with the Commission's *ex parte* rules which he reserves the right to raise in a separate petition.

8. An examination of Nelson's application by the FM Branch engineering staff reveals that, although short-spaced to the Chicago and Clinton stations under the "new" spacing rules, both the Nelson proposal and the Lake Geneva allotment itself are fully-spaced to those facilities under the "old" rules in effect prior to October 2, 1989,[2] during which the rulemaking to add the Lake Geneva allotment was initiated.[3] Nelson's proposal and the Lake Geneva allotment became short-spaced to KMJC(FM) and WBBM-FM only by operation of the Commission's revised spacing rules. Thus, Nelson's application is "grandfathered" in accordance with Section 73.213, and Northwest's petition must be denied. In light of this substantive determination, it is not necessary to address the procedural aspects raised by Northwest.

9. *LGBC.* LGBC notes in Exhibit 1 to its application that principal Stephen A. Sinicropi ("Sinicropi") is vice-president of Suburbanaire, Inc. ("Suburbanaire"), licensee of Stations WLUM-FM, Milwaukee, and WMVP(AM), Greenfield, Wisconsin, and that Sinicropi is general manager of both facilities. In response to Item 12(b), Section II, FCC Form 301, LGBC notes two complaints, filed June 22, 1989 and April 25, 1990, against Suburbanaire before the Wisconsin Equal Rights Division, case numbers 8951508 and 9051159. According to the applicant, the first complaint is in the "investigation stage," and the second was denied by Suburbanaire. Although no determination has been reached as to the merits of these complaints, an appropriate condition to any grant of LGBC's application will be specified below.

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
RLGC	June 4, 1991
LGBC	February 22, 1991
	April 9, 1991

11. LGBC also petitioned for leave to amend its application on December 20, 1990, after the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

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[2] *See Amendment of Part 73 of the Rules to provide for an additional FM Station Class (Class C3) and to increase the Maximum transmitting power for Class A FM stations*, 4 FCC Rcd 6395 (1989).

[3] The *Notice of Proposed Rulemaking* proposing to add the instant Lake Geneva allotment was released on June 13, 1989. *See* Mimeo No. 840605, 54 Fed. Reg. 25,744 (June 19, 1989). The final *Report and Order* adding the allotment was released on February 22, 1990.50 Fed. Reg. 11,375 (March 26, 1990).

12. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Kwiatkowski would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to RLGC, to Kwiatkowski, to Nelson, or to LGBC in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with th National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Kwiatkowski would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, RLGC, Kwiatkowski, Nelson, and LGBC shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with copies to the Chief, Audio Services Division.

16. IT IS FURTHER ORDERED, That the petitions to deny filed by Northwest Broadcasting Company against the application of State IS DISMISSED, and against the application of Nelson IS DENIED.

17. IT IS FURTHER ORDERED, That, in the event of a grant of LGBC's application, the grant shall be conditioned upon whatever action, if any, the Commission deems appropriate in light of the pending EEO complaints discussed in paragraph 9 above.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RLGC LGBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the application of Northwest Broadcasting Company IS DISMISSED.

20. IT IS FURTHER ORDERED, That the application of State Long Distance Telephone Company IS DISMISSED.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

SHARRON ANNETTE HALEY	File No. BPH-880310MZ
SUMTER RADIO PARTNERS	File No. BPH-880310NM
IRIS COMMUNICATIONS, INC.	File No. BPH-880310NS

For Construction Permit for
New FM Station, Channel 234A,
Sumter, South Carolina

ORDER

Adopted: July 19, 1991; Released: July 31, 1991

By the Commission:

1. In a *Memorandum Opinion and Order*, FCC 91M-246, released January 23, 1991, Administrative Law Judge Richard L. Sippel (ALJ) dismissed Sharron Annette Haley's application for her failure to demonstrate that she was financially qualified to construct and operate her proposed station. The Review Board affirmed the ALJ's dismissal order. *Sharron Annette Haley*, 6 FCC Rcd 1567 (1991). Having thoroughly reviewed the record, the ALJ's and the Board's decisions, and the arguments in the pleadings now before us,[1] we agree with the Board's disposition of this matter and affirm its decision.

2. There are, however, several matters raised in Haley's application for review that warrant brief comment. Haley contends that the Commission's recent rulings in *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1604 at n. 6 (1991), and in *Scioto Broadcasters Limited Partnership*, 6 FCC Rcd 1893 at para. 2 (1991), largely undermine the Board's conclusion that dismissal of the application was warranted because Haley failed to show good cause for the acceptance of her post-designation amendment to establish her financial qualifications. According to Haley, pertinent portions of those cases make clear that applicants have an absolute right under 47 C.F.R. § 73.3522(b)(2) to amend defective financial proposals within 30 days after financial issues have been specified against them without making a good cause showing. To the extent that Haley is contending that her June 29, 1990, reporting amendment, which was filed within 30 days after the ALJ added the financial issue, should have been treated as an amendment as of right under § 73.3522(b)(2) to establish her financial qualifications, we find no merit to such a contention. To begin with, that amendment was ordered and accepted by the ALJ solely for the purpose of obtaining information as to Haley's financial condition at that time and not as meeting the financial issue specified against her. *See* FCC 90M-2721, released August 29, 1990. Moreover, § 73.3522(b)(2) only permits post designation amendments as a matter of right where they relate to issues first raised in the hearing designation order (HDO) and where they are filed within 30 days of the HDO. In the *Aspen* footnote upon which Haley relies, we emphasized that we would not extend the 30 day provision of § 73.3522(b)(2) to encompass issues specified in the later portions of proceedings where the risk of disruption and delay in the institution of new service to the public is much greater. Nothing in the record of this case persuades us to hold otherwise now.

3. Nor do we find any merit to Haley's contention that she did not have adequate notice that she was required to promptly file a good cause post-designation amendment to rectify her negative financial certification. Indeed, the ALJ at a prehearing conference held on June 1, 1990, which preceded his addition of the financial issue, advised counsel that Haley would be required to provide such an amendment to establish her financial qualifications at that late date. 6 FCC Rcd at 1568 para. 4. Moreover, as the Board aptly recounted, relevant Commission precedent afforded Haley ample notice of the need to proceed as the ALJ advised or suffer the consequences of dismissal. *Id.* para. 8. Finally, the fact that Haley may have relied on counsel's advice in proceeding otherwise is likewise unavailing. We have held that counsel is the applicant's agent, and that applicants are therefore bound by counsel's action. *See Hillebrand Broadcasting Corp.*, 58 RR 2d 133, 134 n.6 (1986).

4. ACCORDINGLY, IT IS ORDERED, That the Reply to Joint Opposition to Application for Review filed May 9, 1991, by Haley IS DISMISSED.

5. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed April 19, 1991, by Haley IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] An Application for Review filed April 19, 1991, by Haley; a Joint Opposition to Application for Review filed April 26, 1991, by Iris Communications, Inc. and Sumter Radio Partners; and a Reply filed May 9, 1991, by Haley. As Haley did not request permission to file her Reply, the pleading is unauthorized and will be dismissed. *See* 47 C.F.R. § 1.115(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RITA A. CAPOBIANCHI File No. BPH-870730MS

For Construction Permit
for a New FM Station on Channel 233A
in Murrells Inlet, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; Released: July 31, 1991

By the Commission:

1. The Commission has under consideration: (1) a "Petition for Reconsideration" filed on July 20, 1988 by Rita A. Capobianchi ("Capobianchi"), an applicant for a construction permit to establish a new FM broadcast station at Murrells Inlet, South Carolina; and (2) oppositions thereto filed on August 3, 1988, by MurMar Media Corporation and by Gary S. Morris and Nancy C. Morris, A General Partnership. Capobianchi requests reconsideration of the dismissal of her captioned application by the Chief, Audio Services Division, acting by delegated authority, for her failure to respond to an official request for additional financial information, pursuant to 47 C.F.R. § 73.3568(b). *See Palmetto Broadcasting, Inc. of Murrells Inlet*, 3 FCC Rcd 3928, 3930 (MM Bur. 1988). We deny the petition for reconsideration for the reasons set forth below.

BACKGROUND

2. In July 1987, the Capobianchi application and nine other mutually exclusive Murrells Inlet applications were filed. In Section III of her application (FCC Form 301, October 1986 version), Capobianchi certified that "sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Subsequently in December 1987, pursuant to the Commission's March 19, 1987 *Public Notice* styled *In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987), the Murrells Inlet applicants were randomly selected for verification of their financial certifications. *Palmetto Broadcasting*, 3 FCC Rcd at 3929. Each applicant, including Capobianchi, was requested to furnish documentary proof of its financial qualifications for each of its pending applications. *See, e.g., Letter of December 30, 1987 from Chief, Audio Services Division to Counsel for Rita A. Capobianchi (8920-GDG).*

3. On January 19, 1988, Capobianchi responded to the Commission's letter by requesting an extension of time, averring that she was "assembling the documentation and it is hoped that it will be filed shortly, and in no event later than January 29, 1988." On January 29, Capobianchi reported that she had changed communications counsel and requested a further extension of time, until February 5, so that needed files could be transferred from former counsel, and the necessary amendment prepared and submitted by new counsel. However, Capobianchi never did subsequently file her promised financial amendment. Consequently, in the Murrells Inlet hearing designation order released more than four months later, on June 20, 1988, the Capobianchi application was dismissed, pursuant to 47 C.F.R. § 73.3568(b), for failure to respond to an official request for information.

4. In her petition for reconsideration, Capobianchi does not address the reason for her dismissal, namely, her failure to respond to the Commission's official information request. Instead, relying upon *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965), she argues for the first time that the selection of her application for random verification of her financial certification violates the administrative due process principle that similarly situated applicants be treated similarly. In particular, she avers that she "did not file her financial statement with the Commission in support of her application because the filing of a personal financial statement in the public record was not a uniform requirement for every FM application before this Commission, and she felt it unfair that her application, and the applications in the Murrells Inlet proceeding, were singled out for this 'attention'. "Petition at 1.

DISCUSSION

5. We deny Capobianchi's petition for reconsideration because it is undisputed that she failed to prosecute her application by knowingly ignoring the Commission's official written request for information. *See* 47 C.F.R. § 73.3568(b). *Cf. Faith Center, Inc.*, 82 FCC 2d 1, 24-25 (1980), *aff'd without opinion* 679 F. 2d 261 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Nevertheless, we shall take this opportunity to address her claim of unequal treatment and reaffirm that our random verification program is an appropriate general application processing procedure which was properly applied in the Murrells Inlet proceeding.[1] First, and most telling, Capobianchi concedes that each Murrells Inlet applicant was selected for financial certification verification; thus, all applicants in the proceeding were treated alike.

6. Second, the Murrells Inlet applications were treated similarly to all other proceedings in the same class. Specifically, prior to 1981, all broadcast applicants were required to submit "extensive written documentation

[1] Random verification procedures have been used by the Commission, *Renewal of License*, 49 RR 2d 740, 743, 749-755 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. FCC*, 719 F. 2d 407, 410, 416 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984), and recognized by the courts as an appropriate administrative tool to uncover and to deter abuses. *See, e.g., Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), *rehearing denied*, 473 U.S. 926 (1985); *Black Citizens for a Fair Media, supra; Ginsburg, Feldman & Bress v. Federal Energy Administration*, 591 F. 2d 717, 720-721 (D.C. Cir. 1978).

supporting their financial qualifications, including a 'detailed itemization of projected expenditures and sources of funds,... a balance sheet, a statement of yearly income and assorted documentations.'" *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989) (summarizing history of revisions to Form 301); *Revision of Form 301*, 50 RR 2d 381, 382 (1981). To expedite broadcast application processing, the Commission revised the application form to permit applicants to certify, rather than document, their financial qualifications, but it nevertheless provided that supporting documentation must be made available to the Commission upon request. *Revision of Form 301*, 50 RR 2d at 382, 388. Subsequently on March 19, 1987, the Commission, concerned that "five years of experience with the financial certification requirement in lieu of documentation" revealed certain recurring abuses of the Commission's processes, specifically the certification by many applicants of their financial qualifications without any basis or justification, released a public notice advising all broadcast applicants and potential applicants that the Commission staff:

> will initiate a program of random checks of the financial qualifications of applicants for construction permits for new broadcast facilities. Such random checks will be conducted as part of the staff's pre-designation processing....[E]ach applicant selected for financial certification verification will be directed to submit documentation and information supporting its certification that it has available the financial resources to construct and operate the facility for three months without reliance on advertising or other station revenues. If such financial certification check reveals that an applicant's certification is false, hearing issues will be designated to determine (i) whether the applicant is financially qualified to be granted the construction permit, and (ii) whether the false certification involves misrepresentation.

In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits (Public Notice), 2 FCC Rcd 2122 (1987) (footnote omitted).

7. All broadcast applications filed after release of that *Public Notice* but before June 26, 1989 (when FCC Form 301 was further revised),[2] comprise the class of applications which have been subjected to random verification of their financial certification. The Murrells Inlet applications, which are members of this class, were randomly chosen for such verification in accordance with procedures applicable to the entire class. Therefore, no violation of the *Melody Music* principle has occurred in this proceeding. In view of the foregoing, we affirm the staff's dismissal of the Capobianchi application.

8. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on July 20, 1988 by Rita A. Capobianchi IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] The June 26, 1989 revisions to FCC Form 301 added the requirement that an applicant submit cost estimates, identify each source of funds, and have supporting financial documentation on hand when it submits its application. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3859 (1989); *see also Northampton, supra*, 4 FCC Rcd at 5519. These additional requirements obviate the need for random verifications of financial certifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

CARMEL BROADCASTING LIMITED PARTNERSHIP — File No. BPH-880208MK

LONE CYPRESS RADIO ASSOCIATES, INC. — File No. BPH-880210ML

HIGHLANDS BROADCASTING CO., INC. — File No. BPH-880211MK

PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A California Limited Partnership — File No. BPH-880211ML

Stoddard Johnston and Sherrie McCullough d/b/a J & M BROADCASTING COMPANY — File No. BPH-880211MM

CAL TOWER BROADCAST GROUP — File No. BPH-880211MR

For Construction Permit for
New FM Station, Channel 238A,
Carmel, California

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; **Released: July 31, 1991**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The application of Carmel Broadcasting Limited Partnership (CBLP) was dismissed by Chief Administrative Law Judge Stirmer because of CBLP's "failure to produce Frederick R.-L. Osborne . . . in defiance of the Presiding Judge's directive to produce a principal who was a necessary and essential witness." *Memorandum Opinion and Order*, FCC 91M-871, released March 8, 1991. On March 15, 1991, CBLP appealed the dismissal order, and oppositions were filed to the appeal by J & M Broadcasting and Lone Cypress Radio Associates. The appeal was held in abeyance until the Commission denied CBLP's petition for extraordinary relief directed to the Presiding Judge's addition of the hearing issue. *See Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991). We now affirm the dismissal of CBLP's application for the reasons set out below.

2. On November 23, 1990, the issues were enlarged in this multi-party comparative hearing by the addition of the following basic qualifications issue:

> To determine whether Frederick R.-L. Osborne, President and majority stockholder of Auburn Cablevision, Inc., the purported "limited partner" in CBLP, has abused the Commission's processes in other comparative hearing proceedings (*e.g.*, Irondequoit, New York-MM Docket No. 80-517 and Fresno, California, MM Docket No. 88-21) and/or in this proceeding).

Memorandum Opinion and Order, FCC 90M-3695, released November 23, 1990. CBLP sought leave to appeal the addition of this issue, and a stay of the hearing, which the Presiding Judge denied. It later sought extraordinary relief from the Commission, which was recently denied. *Carmel Broadcasting, supra.*

3. Several months after addition of the issue, CBLP sought leave to amend its application to withdraw Frederick Osborne, and based on that amendment it sought partial summary judgment on the Osborne abuse of process issue. These requests were denied. *See Memorandum Opinion and Order*, FCC 91M-760, released February 27, 1991.

4. After the filing of exhibits on the designated issues on February 15, 1991, two of the competing applicants requested that Frederick Osborne be produced for examination at the hearing. CBLP objected to his production, and after a hearing conference on February 28, 1991 "the Presiding Officer directed CBLP to produce Frederick R.-L. Osborne, the majority stockholder of ACI, a 75% equity owner of the applicant." FCC 91M-871, *supra*, para. 5.

5. At the hearing which convened six days later, on March 4, 1991, CBLP failed to produce Frederick Osborne, and instead offered a written statement indicating that it had decided to meet the issue by timely exchanging the exhibit of another witness, its General Partner Richard Osborne, and amending the application to withdraw Frederick Osborne. Appeal p. 1. After considering the written statement and arguments from all the parties, the Presiding Judge held that CBLP had "refused to produce Frederick R.-L. Osborne, a necessary and essential witness, despite being directed to do so" FCC 91M-871, para. 6; that "the failure to produce . . . Osborne was a conscious and deliberate undertaking . . . in defiance of the Presiding Judge's directive to produce a principal who was a necessary and essential witness" *Id.*, para. 7; and that the dismissal of CBLP's application was in accord with the Commission's decision in *Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990).

6. *DISCUSSION*: CBLP argues on appeal that the dismissal order in this case is not consistent with *Lorraine Walker Arms*, *supra*, because Frederick Osborne "the witness in question is no longer a principal of CBLP," and that "CBLP has challenged the lawfulness of the issues" designated by the ALJ. Appeal p. 5.

7. "First, the specification of the issues was an error," CBLP argues, and "an ALJ has no jurisdiction to try matters except pursuant to a lawful issue. Here, CBLP has challenged the lawfulness of the issues." Appeal, pp. 3, 5. This argument is without merit since the Commission has denied CBLP's challenge of the ALJ's *Memorandum Opin-*

ion and Order, FCC 90M-3695, specifying the relevant issues in this case. *See Carmel Broadcasting, supra*. Moreover, "[A]pplicants do not have the prerogative of disobeying the ALJ's discovery orders merely because they believe that antecedent rulings were legally erroneous." *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5902 (1990).

8. Next, CBLP argues that: "The ALJ further erred in denying CBLP's pleadings concerning the withdrawal of |Frederick Osborne|," and that "CBLP's action was consistent with the Commission policy that encourages applicants to amend their ownership to meet disqualifying issues so long as they do so prior to hearing. *California Broadcasting Corp.*, 68 RR 2d 1056, 1058 (1990)." Appeal, p. 3. Here, the ALJ found that the applicant had not demonstrated good cause or acted with due diligence. *See* FCC 91M-760, released February 27, 1991, para. 3. Moreover, even if the amendment had been granted, CBLP has not established that, as a matter of law, it would have mooted the substantial questions regarding the relationship among CBLP, Richard and Frederick Osborne, and Frederick Osborne's possible abuse of process in this and other Commission proceedings.

9. In *TV 9 Inc. v. FCC*, 495 F. 2d 929, 939-40 & n. 32 (D.C. Cir. 1973), the court held that an amendment permitting the withdrawal of a potential wrongdoer in a comparative hearing had not "mooted the significance of the facts which gave rise to it with respect to the applicant's character, or mooted any other consideration relevant to the matter." The competing applicants who had raised those matters were entitled to a "hearing for a thorough inquiry into the character qualifications of [the applicant] growing out of the association of [the potential wrongdoer] as a participating principal of the applicant . . . ." That ruling fully supports the ALJ's present ruling that Frederick Osborne, the potential wrongdoer in this case, was "a principal and an essential witness" which CBLP had to produce for examination.

10. CBLP's basic argument is that it can choose "to respond to an issue in a manner that does not comport with the ALJ's preliminary . . . assessment of the issue." And, that it intended to rest its case on the position that the withdrawal of Frederick Osborne rendered moot all matters not addressed by Richard Osborne in his written exhibits (Appeal, pp. 2, 5). CBLP's argument "ignores the Commission's controlling legal principle that it is the presiding ALJ who is authorized to decide which witnesses *must* be produced for cross-examination. *See Lorraine Walker Arms, supra.* " *Josie FM Limited Partnership*, 6 FCC Rcd 891 (Rev. Bd. 1991). Here, after all prehearing procedures had been exhausted, the ALJ *directed* that CBLP had to produce Frederick Osborne, a principal and essential witness, for cross-examination by the other parties on a basic qualifications issue. Since that order was outstanding, and had not been stayed, CBLP could not unilaterally decide that the witness need not attend the hearing. As the Commission indicated in *Lorraine Walker Arms*, 5 FCC Rcd at 7103: "No hearing system can function effectively if the parties disregard the presiding officer's lawful orders with impunity." Under the circumstances of this case, we conclude here, as did the Commission there, that "the need to punish abuse of the system and deter further misconduct" *id.*, justifies the dismissal of CBLP's application.[1]

11. ACCORDINGLY, IT IS ORDERED, That the appeal filed on March 15, 1991 by Carmel Broadcasting Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] CBLP did not argue that the "withdrawing" witness had refused to cooperate and testify in this proceeding; in any event, remedies are available for obtaining such "necessary and essential" testimony. *See Dorothy O. Schulze*, 5 FCC Rcd 3227, 3229 n. 2 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-112

In re Applications of

LOWNDES COUNTY BROADCASTING	File No. BPH-880226ML
ALBERT LEON BROOKS	File No. BPH-880301MT
SKY BROADCASTING COMPANY	File No. BPH-880301NU

For Construction Permit for
New FM Station, Channel 299A,
Valdosta, Georgia

ORDER

Adopted: July 22, 1991; Released: July 31, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On February 14, 1991, Albert Leon Brooks filed a petition for extraordinary relief and an emergency motion for stay, both of which were supplemented on February 20 and February 27, 1991, respectively. Thereafter, all the parties including Albert Leon Brooks entered into a settlement agreement which Administrative Law Judge Richard L. Sippel approved by Summary Decision, FCC 91D-38, released July 17, 1991. Thus, the petition for extraordinary relief and motion for stay are now moot.

2. ACCORDINGLY, IT IS ORDERED, That Albert Leon Brook's petition for extraordinary relief and emergency motion for stay, filed February 14, 1991 as supplemented February 20 and February 27, 1991, respectively, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-83

In re Application of

WILLIAM E. KUIPER, JR. File No. BPH-880125MA

For Construction Permit for
New FM Station, Channel 263A,
Walker, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1991; Released: July 31, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. On July 3, 1991, the Review Board adopted a *Memorandum Opinion and Order*, FCC 91R-61 (released July 11, 1991), approving a Joint Request for Approval of Settlement Agreement in the captioned proceeding. Pursuant to this universal settlement, the Board dismissed the two remaining competing applicants, granted the application of William E. Kuiper, Jr. (Kuiper), and terminated this proceeding.[1]

2. However, the Board has been informally notified that the Commission's internal records indicate that one applicant, who was designated for hearing by the *Hearing Designation Order*, 5 FCC Rcd 1756 (1990), in this proceeding (Broadcast House Incorporated) was not formally dismissed for failure to prosecute its application by separate order of the Presiding Officer or in his *Initial Decision*, 6 FCC Rcd 3375 (1991).[2] That oversight will now be cured by the Board.

3. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR § 1.113(a), the Review Board, on its own motion, FURTHER MODIFIES its *Memorandum Opinion and Order*, FCC 91R-61, released July 11, 1991 (corrected copy released July 15, 1991) and DISMISSES the application of Broadcast House Incorporated (File No. BPH-880126MN), with prejudice, for failure to prosecute its application.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Subsequent to the adoption of this *Order*, the Board received a Contingent Petition for Leave to Amend and Proposed Amendment filed by Kuiper, proposing to withdraw Kuiper's integration pledge to the facility here, and to modify his divestiture pledge. The Board modified, on its own motion, pursuant to 47 CFR § 1.113(a), its prior *Order* and granted Kuiper's petition by *Memorandum Opinion and Order*, FCC 91R-63, adopted July 16, 1991.

[2] The Commission's, Review Board's, and the Presiding Officer's records indicate that Broadcast House did not enter a notice of appearance, pursuant to 47 CFR § 1.221, did not participate in the hearing proceeding, and did not file exceptions, pursuant to 47 CFR § 1.277. It is also noted that none of the remaining parties requested dismissal of the Broadcast House application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

KFBB CORPORATION File No. BPCT-891221KG

For Construction Permit
for a New Television
Station on Channel 10,
Helena, Montana

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1991; Released: August 1, 1991

By the Commission:

1. The Commission has before it for consideration: (1) the above-captioned application of KFBB Corporation (KFBB) for a construction permit for a new television station on channel 10, Helena, Montana;[1] (2) a petition to deny that application filed by Big Sky Limited Partnership (Big Sky), licensee of station KTVH-TV, channel 12 (NBC), Helena, Montana; and (3) related pleadings. KFBB is also the licensee of KFBB-TV, channel 5 (ABC), Great Falls, Montana. The proposed operation of Channel 10 would result in the overlap of that station's predicted Grade B contour with that of KFBB-TV. Section 73.3555(a)(3) of the Commission's Rules ordinarily prohibits the common ownership of television stations with overlapping Grade B contours. However, KFBB proposes to operate Channel 10 as a "satellite" of KFBB-TV and requests grant of the application pursuant to the exception for satellite operations set forth in Note 5 to the Commission multiple ownership rules, Section 73.3555.[2] Note 5 to Section 73.3555 permits consideration of overlap questions involving satellite operations on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in questions would be in the public interest.

SATELLITE PROPOSAL

2. The engineering report submitted by KFBB in support of its request shows that the Grade B contour of KFBB-TV encompasses an area of 9,830 square miles and a population of 93,858, and the proposed Grade B contour of Channel 10 would encompass 2,221 square miles and 47,857 persons. The Grade B overlap area between KFBB-TV and the proposed satellite would encompass 221 square miles containing 599 persons. This represents 2.2 percent of the area and 0.6 percent of the population within KFBB-TV's Grade B contour, and 10.0 percent of the area and 1.3 percent of the population within Channel 10's proposed Grade B contour. KFBB states that the overlap area receives service from five television stations, three of which serve the entire overlap area.[3]

3. KFBB maintains that the Commission has considered a variety of factors in evaluating whether satellite operation is warranted, including the size of the market, economic forecasts and projections, the history and experience of other licensees in the market, technical considerations affecting the operation of the station, and the public interest, citing *Voice of the Caverns, Inc. (Voice)*, 4 FCC2d 946 (1966); *Frontier Broadcasting Co.*, 5 FCC2d (1966) (*Frontier*); and *Meyer Broadcasting Co.*, 67 FCC2d 593 (1978), *aff'd sub nom., Dickinson Broadcasting Corp. v. FCC*, 593 F.2d 1370, 1371 (D.C. Cir. 1979) (*Meyer*). KFBB argues that a grant of its request is warranted because of the small size of the community, noting that the Helena ADI (area of dominant influence) is ranked 209th by Arbitron (out of the 212 markets ranked by Arbitron) having 18,900 television households. It notes that Helena, located in Lewis and Clark County, has a total population of 23,938, and that East Helena, located adjacent to Helena, has a population of 1,647. KFBB states that these two towns making up the market's area of dominant influence currently support only one full-service television station, KTVH-TV (channel 12, NBC) (the petitioner herein). Thus, KFBB argues, given its size and business potential, the Helena-East Helena community cannot provide the revenues needed to operate a second full-service television station. It contends that the inherent inability of the community to sustain a second full-service station is a characteristic shared by similar markets. In this regard, KFBB maintains that seven of the nine next largest television markets after the Helena market have only one station, and the remaining two markets have only two licensed television stations. The markets with the two stations, it observes, are distinguishable from Helena in that they are 30 and 35 percent larger than Helena. Moreover, KFBB asserts, the inability of the Helena community to support a full-service station is demonstrated by the Commission's records which indicate that at least one permit previously held for the construction of a full-service television station in the market was cancelled on September 25, 1987.

4. Additionally, KFBB maintains that the public interest would be served by a grant of its request because the proposed signal of Channel 10 will not substantially duplicate the programming provided on existing stations whose Grade B contours encompass the Helena community. In addition to providing Helena with its second local television service, KFBB asserts, a grant of its request would serve the public interest by providing the Helena community with its only off-the-air ABC network cov-

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[1] Hereafter, we will refer to the proposed station as Channel 10.

[2] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent programming, but originates less than five percent of its programming locally. *See Amaturo Group, Inc.*, 68 FCC2d 899 (1978). KFBB now proposes to operate Channel 10 as a 100-percent satellite station. However, it is planning to build local studio facilities in the near future for the broadcast of some local programming.

[3] The stations are KTVH-TV, channel 12 (NBC), Helena; KRTV-TV, channel 3 (CBS); Great Falls; KFBB-TV, channel 5 (ABC), Great Falls; KTVM(TV), channel 6 (NBC, ABC), Butte; and KXLF(TV), channel 4 (CBS), Butte, all Montana. KTVM(TV) operates primarily as a satellite of KECI-TV, Missoula, Montana.

erage.[4] Moreover, KFBB points out, the proposed station will provide local service spots and live news broadcasts direct from the community of license. Finally, KFBB indicates that it will be unable to construct the Channel 10 studio facilities until sometime in the near future. Thus, it is proposing a 100-percent satellite operation at this time with plans to upgrade Channel 10 to "primarily a satellite" once finances permit it to construct a local studio. During the interim, KFBB states, the local programming will be produced with the assistance of personnel and transmission facilities provided by KFBB-TV and its sister station in Billings, Montana.

PETITION TO DENY

5. Big Sky, the licensee of KTVH-TV, Helena, alleges that the KFBB satellite proposal threatens the continuing existence and operational viability of its station. Big Sky notes that it acquired KTVH-TV in October 1988 from KTVH, Inc. by order of the Bankruptcy Court, and that KTVH, Inc. previously had acquired the license through a bankruptcy proceeding in 1985. Upon acquisition of KTVH-TV, Big Sky states that it was faced with the substantial costs of upgrading a deteriorated physical plant and related facilities in a "fragile" market. Nevertheless, Big Sky avers, it was committed to devote its maximum resources to the achievement of superior quality in all aspects of the KTVH-TV operation, and that it has largely achieved that goal under difficult and precarious conditions. Specifically, it states that it has improved the quality and local sensitivity of the station's programming, has expanded the news staff, and has increased the hours of local news. Big Sky claims that its efforts to improve KTVH-TV's operation to better serve the Helena community has been a demanding and perilous undertaking and that this effort is materially dependent upon at least the maintenance of the existing fragile competitive balance in the market. An unnecessary disruption of that balance, Big Sky maintains, presents the likelihood of substantial disservice to the Helena community.

6. Additionally, Big Sky alleges, KFBB has failed to demonstrate any compelling public interest need for the proposed satellite operation. In fact, it states, there is no need for a satellite service in Helena and that such an operation would disserve the Helena community. Big Sky maintains that KFBB's avowed intent to provide local service to Helena can be satisfied through its existing presence in the market.[5] Big Sky asserts that KFBB-TV and KTVH-TV have operated in their respective markets for more than three decades without any perceived necessity for KFBB to construct a station in the separate Helena market. The proposed satellite, it claims, would extend the KFBB-TV full-power signal to cover the heart of the Helena market and nearly the entire population now served by KTVH-TV. Since the KFBB-TV Grade B contour does not now encompass Helena, Big Sky argues, KFBB's proposal would have adverse competitive effects on existing service.

7. Big Sky argues that since Helena now adequately receives the KFBB-TV programming and ABC network service via translator K10FT, KFBB's proposal is rooted in part in the prospect of private, commercial gain by KFBB and its ownership group. In this regard, it alleges that the KFBB satellite proposal is motivated by a desire to "tie-up" the channel 10 allocation at Helena and to foreclose application therefor by other entities. Therefore, Big Sky contends that, since the KFBB proposal is in effect barring the introduction of a diverse voice, denial of the satellite application is warranted, citing *tvUSA/Pueblo, Ltd.*, 4 FCC Rcd 598, 600 (Mass Media Bureau 1989), *aff'd*, 5 FCC Rcd 7437 (1990).

8. Big Sky also argues that since KFBB is not unfairly positioned in regard to its direct competitors, it has no public interest need to expand its presence in the wholly separate Helena market. In this regard, Big Sky claims that KFBB's parent, MDM Broadcasting Corporation (MDM), owns television stations in the two largest communities in Montana (KFBB in Great Falls and KULR-TV in Billings). It notes that MDM also owns VHF, network affiliated television stations in Cheyenne, Wyoming (KKTU-TV), and Austin, Minnesota (KAAL-TV). With a grant of the proposed satellite at Helena, it alleges, MDM would own and control three full-power VHF stations with at least predicted Grade B coverage in four of the six Arbitron ADI's located in the State of Montana.

9. Big Sky further argues that relevant law and policy dictate that KFBB's proposal should be denied. It asserts that the cases cited by KFBB in support of its proposal are inapposite or distinguishable. In *Frontier*, Big Sky claims that the only question posed was one of undue concentration of control. Similarly, it states, the satellite proposal in *Voice* was intended to preserve the community's sole existing television station. In *Meyer*, while the Commission authorized a satellite operation in competition with an existing full-service station, Big Sky asserts, that action was premised primarily upon a finding of a specific and compelling need for such a facility in that market. There, it maintains, 14,000 persons were without access to NBC network programming, the proposed satellite was the only means of providing that service, and there was no showing of any special circumstances presenting a substantial question of materially adverse competitive impact upon the existing station. Here, Big Sky argues, there has been no showing that ABC's network programming is not adequately available to most of the population of Helena through the existing KFBB-TV, Channel 10 translator and by carriage of KFBB-TV on the local cable television system in Helena. It states that in denying a satellite proposal in *tvUSA/Pueblo, Ltd., supra*, the Bureau recommended the utilization of one or more translators in lieu of a satellite where a given entity seeks to provide its programming to assertedly unserved areas. Thus, Big Sky maintains, if KFBB believes that there exists some area which does not now have reasonable access to ABC programming, it may seek one or more additional translator authorizations to serve such asserted need.

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[4] KFBB points out that the community currently is served in a more limited capacity by its translator station K10FT, in Helena, which rebroadcasts the signal of KFBB-TV.

[5] Big Sky notes that KFBB currently operates a translator at Helena, and that the KFBB-TV signal is carried on cable. Additionally, it contends, since 95 percent of the market population resides in "Helena Proper," the existing translator more than encompasses that population concentration. Thus, it maintains, KFBB-TV programming is adequately available in the Helena market.

OPPOSITION

10. KFBB states that the small size of the community and the "fragile" economic nature of the Helena market support its claim that the market cannot support an additional full-service station. Moreover, it notes, that Big Sky admits that KTVH-TV, Helena's only existing full-service television station, has had a long history of economic problems. While it believes that the Helena community cannot support a second full-service station, KFBB avers that Helena's viewers deserve a programming choice. A grant of the satellite application, KFBB argues, would result in significant cost savings which are essential to the financial viability of a second television station in the Helena area. It states that cost savings will result because there will be no need for significant duplicate clerical, accounting, sales, programming and promotions staff. Additionally, KFBB asserts, the Helena facility will be bolstered by KFBB-TV's reputation and credibility in the market. It also contends that a grant of the application would result in the initiation of off-the-air ABC network coverage to 47,857 viewers located within 2,201 square miles, and would provide the Helena community with a choice in off-the-air network programming. Further, KFBB claims, its proposal would permit KFBB-TV to provide off-the-air service to both the East Helena and Fort Harrison areas of the Helena community. Contrary to Big Sky's assertions, KFBB argues, the KFBB-TV translator on channel 10 does not adequately provide service to the Helena community. In fact, it states, the translator barely provides service to viewers within the Helena city limits, and viewers in the East Helena and Fort Harrison areas cannot receive KFBB-TV off the air.[6] In this regard, KFBB notes that in 1988, it was forced to relocate the channel 10 translator transmitter site from the city of Helena by the city council. The only technically feasible site to which the transmitter could relocate, KFBB states, required it to change the KFBB-TV antenna array from a directional to an omnidirectional pattern, and resulted in a substantial loss in elevation. KFBB avers that the loss in effective radiated power in conjunction with a substantial loss in elevation resulted in poor coverage to the Helena community.

11. KFBB argues that in the past the Commission has found that where the addition of a second television service would result in a network choice, by way of not only new service but also improved reception, any possible adverse effects on an existing station are outweighed by the benefits to the public. *See Pete J. Stathakas*, 60 RR2d 1293, 1295 (1986). It asserts that a recognized or perceived competitive imbalance between a satellite and a full-service television station has never been found by the Commission to automatically prohibit authorization of a satellite facility. On the contrary, KFBB states, the Commission's policies have veered towards requiring broadcasters to "'survive or succumb' in the marketplace, dependent ultimately on the lure of their programming and the prowess of their entrepreneurship." *Meredith Corporation*, 4 FCC Rcd at 2679 (1989); *see also Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). Additionally, it avers, "the Commission has become increasingly sensitive to the fact that 'private economic injury is by no means always, or even usually reflected in public detriment.'" *Policies Regarding Detrimental Effects*, 3 FCC Rcd at 640, *quoting Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440, 443 (D.C. Cir. 1958). Thus, KFBB argues, Big Sky's petition falls short of establishing that KFBB's proposal to provide the Helena community with its first free off-the-air network choice contradicts rather than serves the public interest. Concerning Big Sky's allegation that its application was filed to protect its existing translator, KFBB states that it is not uncommon for a licensee of a translator to upgrade by applying for a satellite facility.

DISCUSSION

12. In all satellite cases, the applicant is required to submit a showing to support the exception to the multiple ownership rules. In challenging satellite applications, pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must, as a threshold matter, submit specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Once the pleading standard is satisfied, the Commission must determine whether the record as a whole (*i.e.*, the application, the pleadings, and other matters which may be officially noted) presents a substantial and material question of fact requiring a hearing. *See* Section 309(d)(2). Against this backdrop, we turn to the question to be resolved here; namely, whether the operation of Channel 10 as a satellite of KFBB is warranted.

13. The goals of our multiple ownership rules are to promote economic competition and diversity of programming viewpoints. *See, e.g., Multiple Ownership of Standard, FM and Television Stations*, 45 FCC 1476, 1476-77, *recon. denied*, 45 FCC 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 of Section 73.3555 of the Rules. What constitutes a sufficient showing for an exception to the duopoly rule for a satellite operation has been established by case law and involves a balance of various factors, including the degree of overlap between the stations, the capacity of the market to support a full-service station, the level of service available in the market, the financial difficulties of the stations involved, as well as other considerations. *See Television Satellite Stations Review of Policy and Rules*, FCC 91-182, released July 8, 1991 (*Report and Order*).[7]

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[6] Big Sky claims that observations and measurements undertaken by its engineer demonstrate that viewers in the East Helena and Fort Harrison areas can in fact receive the KFBB-TV signal off the air by means of the channel 10 translator. At Fort Harrison, it states, the picture observed was good to excellent and compared favorably with the KTVH-TV picture at that point. In East Helena, Big Sky maintains, the picture observed was inferior to the KTVH-TV picture, but was adequate.

[7] In the *Report and Order*, the Commission revised its policy and rules concerning television satellite applications. This new policy will be effective on August 14, 1991. Accordingly, our decision here reflects our current policy of granting applications on a case-by-case basis.

14. On the basis of the information before us, we believe that grant of the requested satellite exception is consistent with Commission's precedent and with the purpose of our satellite policy. First, the overlap in this case is not substantial and amounts to only 221 square miles and 599 persons. Helena is a small community of 25,585 (Helena and East Helena) persons. In addition to NBC affiliate KTVH(TV), the Helena community receives Grade B service from only two other full-service television stations, ABC/NBC affiliate KTVM(TV) in Great Falls, which operates as primarily a satellite of KECI-TV in Missoula, and CBS affiliate KXLF-TV in Butte. The proposed satellite operation will bring a second full-service television station to the community and the first full-time off-the-air ABC network coverage. *See Channel 41, Inc.*, FCC 91-192, released July 1, 1991. KFBB also proposes to provide the community with local public service programming and live news broadcasts. The small size of the market and the history of broadcasting in the market (one station having gone through two bankruptcies and a construction permit for a second full-service station having been cancelled) support the applicant's contention that the market is not likely to support a second full-service television station.[8] *See Capitol Broadcasting Co.*, 54 RR2d 811 (1983). The fact that Helena receives the Grade B signal of only three stations indicate that the community is underserved and is the type of community that could benefit substantially from another programming choice. A grant of the satellite exception appears to be the only means of providing the Helena's community with an additional programming choice. Thus, we are persuaded that significant public interest benefits would flow from a grant of a satellite exception, and that such benefits outweigh any marginal impact on diversity and economic competition resulting from the very small contour overlap proposed here.

15. Big Sky claims that KFBB-TV's programming is now adequately received in the community via translator station K10FT. In response, KFBB argues that translator service would be inferior to satellite service. We recognize that we have recently stated that "a showing that translators or boosters are not as desirable as a single full-service station, is not *alone* a basis for granting a satellite exception to our multiple ownership rules." *tv/USA Pueblo, Ltd.*, 5 FCC Rcd at 7438 (emphasis added). Thus, we do not use the advantages of a satellite over translator operation here as the basis for our determination that grant of a satellite application is in the public interest. However, having found that grant of a satellite application is in the public interest under our traditional analysis, we believe further support for satellite operation exists in the fact that a translator is not a viable alternative to a satellite operation here. Translators by their very nature are limited in coverage and not likely to serve sparsely populated areas in and around Helena. Obviously, the public interest will be served by a full-service station, be it a stand-alone facility or a satellite (which, we note, has the same signal strength as a nonsatellite facility). Such a facility will provide a more reliable and better quality signal. Further, Big Sky's contention that the subject application was filed by KFBB to tie-up the channel 10 allocation is not a basis for adverse actions. Every up-grade from a translator to a full-service satellite station "ties-up" a channel from full-service non-satellite use by others. The channel in this case has been available for years without attracting any interest. Moreover, when KFBB's application was placed on a cut-off list, no competing applications were filed. The fact that KFBB seeks to provide improved service is consistent with the public interest, and indeed, a policy that discouraged such upgrades to satellite service in the face of no expressions of interest in a full-service non-satellite station (and evidence suggesting that another full-service station could not be sustained) would be contrary to the public interest.

16. Big Sky also argues that a grant of the satellite proposal for Helena would adversely affect its ability to compete in the market and would disserve the public. However, it is not the purpose of the Act to protect licensees from competition. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). It appears that Big Sky is attempting to resurrect the *Carroll* doctrine, which has been eliminated (*see Policies Regarding Detrimental Effects*, cited above). Nevertheless, even if the *Carroll* doctrine were still applied in Commission proceedings and were properly applicable in this context, Big Sky has not met the heavy burden of pleading to establish that authorization of satellite operation here would result in a net degradation of service. *See also Arnold L. Chase*, 5 FCC Rcd 1642, 1645 and n. 15 (1990) (competitive effect of creating a TV/radio combination on another area broadcast licensee found not relevant to the decision).

17. Similarly, we note that MDM ownership and control of other television stations with at least predicted Grade B coverage in four of the six Arbitron ADI's within Montana does not contravene any Commission Rule or policy and does not preclude a grant of this application. In fact, the Commission abolished its regional concentration of control rule in *Multiple Ownership (Regional Concentration of Control Provision)*, 55 RR2d 1389 (1984).

18. In the past, the Commission has declined to authorize unconditionally a 100-percent satellite stations in markets that already have an operating full-service television station because the 100-percent satellite station would have an unfair competitive advantage over the full-service station. Even so, in such markets we have permitted the satellite station to operate initially as a 100-percent satellite so long as the satellite station constructs a local studio and originates some local programming in the near term, usually within one year of commencing operation. *See Further Notice of Proposed Rulemaking*, above. *See also Midcontinent Broadcasting Co. of Wisconsin*, 12 FCC2d 111 (1968) and *Meyer* , above. KFBB has provided us with no grounds for deviating from this precedent. Thus, because a full-service station is licensed to Helena, we will require KFBB to construct a local studio and to originate some local programming no later than one year after the station commences operation. In view of the foregoing, and conditioned as indicated, we find that the proposed satellite operation will serve the public interest.

19. In sum, having considered all of the information before, we find that the petition to deny and related pleadings filed in this proceeding by Big Sky fail to raise a

[8] Indeed, petitioner's contention that the Helena market is economically marginal supports our belief that it cannot support a second full-service station.

substantial and material question of fact that would require a hearing. We find that the applicant is fully qualified and that grant of the application would serve the public interest. However, because there is a full-service television station licensed to Helena, we are conditioning the grant of this construction permit to require that KFBB construct a main studio in Helena and commences origination of local programming no later than one year after the station commences operation.

20. Accordingly, IT IS ORDERED, That the petition to deny filed by Big Sky Limited Partnership IS DENIED.

21. IT IS FURTHER ORDERED, That the satellite exception to Section 73.3555(a)(3) of the Commission's Rules IS GRANTED; and That the above-captioned application (BPCT-891221KG) for construction permit for a new television station on channel 10, Helena, Montana, IS GRANTED, subject to the following condition:

> The applicant shall construct a main studio in Helena, Montana, and commence origination of local programming no later than one year after Channel 10 commences operation.

22. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail - Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-382

In re Applications of

Evelyn Roy Rogers and Morris A. Rogers d/b/a THE DUNLIN GROUP — File No. BPH-880629MC

SEASIDE WIRELESS, LTD., L.P. — File No. BPH-880701MF

H.H. & L., INC., d/b/a H.H. & L. COMMUNICATIONS — File No. BPH-880701MM

For Construction Permit for
New FM Station, Channel 280A,
Seaside, California

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1991; Released: August 2, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is an Appeal, filed June 20, 1991, by Seaside Wireless, Ltd., L.P. (Wireless) from the *Memorandum Opinion and Order*, FCC 91M-1905, released June 28, 1991 (*MO & O*), of Administrative Law Judge Richard L. Sippel (ALJ). In his *MO & O*, the ALJ dismissed the Wireless application from this proceeding (1) for non-compliance with his previous *Order*, FCC 91M-1779, released June 3, 1991, requiring the appearance at hearing of a former principal of Wireless; and, (2) for, therefore, failure to prosecute its application. Both competing applicants opposed the Wireless appeal on June 27, 1991.

BACKGROUND

2. On May 7, 1991, and two weeks prior to the time that direct case exhibits were to be exchanged in this proceeeding, a 50% "general" partner (and 21% equity owner) of Wireless, Ethel M. Mike (or Mike), withdrew as a partner from that applicant, relinquished her 21% equity interest, and was purportedly held harmless from all future applicant obligations. On May 21, 1991, when it (timely) filed its direct case exhibits, and based upon the withdrawal of Mike, Wireless also withdrew its entire ownership/management integration proposal, electing instead to proceed without seeking any comparative credit for such ownership integration.[1] It proposed to proceed with its remaining "general" partner, Lee Mirabel,[2] who would sponsor the residual direct case of Wireless at hearing. *MO & O* at n.2.

3. However, on May 30, 1991, and notwithstanding Mike's withdrawal as a Wireless principal, the ALJ propounded a (later-issued) ruling that required the appearance of Mike for cross-examination. *Order*, FCC 91M-1779, released June 3, 1991. Unfortunately, and in part because Wireless counsel was in Florida on other business for several days, Lee Mirabel did not finally communicate with Ethel Mike on her appearance until June 7, at which time Mike advised Mirabel that she would not appear voluntarily at the hearing scheduled for June 11, despite the Wireless offer to pay Mike's expenses. *See MO & O*, para. 5. Lee Mirabel relayed Mike's declination to Wireless counsel on Sunday evening, June 9, at which time counsel believed that seeking a "subpoena at this very late hour would be unavailing"; it was decided instead to "seek leave to appeal the presiding Judge's [*Order*] . . . requiring the attendance of Ms. Mike at hearing." *Id.* (quoting Wireless counsel).

4. On the appointed date of the opening hearing session, June 11, Wireless counsel and its remaining "general" partner, Lee Mirabel, appeared and conveyed to the ALJ the fact that Ethel Mike had refused to appear voluntarily as a witness. It thus presented the ALJ with alternative requests. The first was a Motion For Leave To Appeal the ALJ's prior order for the appearance of Mike. The ALJ denied that motion because in his view:

> The state of the record just prior to trial left substantial questions about the viability of Wireless' application. For example: (a) how was Mirabel going to carry out the proposal without Mike's participation; (b) how does Mike's sudden departure effect the applicant's reasonable assurance of financing; (c) has the partnership been dissolved as a matter of fact and law as a result of a general partner's withdrawal; (d) would the redistribution of equity change the role(s) of any limited partner(s) and neutralize any related insulation provisions of the partnership agreement. These are substantial questions which, at a minimum, require Mike's appearance for testmonial explanation and cross-examination. Thus, the Judge's decision requiring Mike's appearance (FCC 91M-1779) does not present any new or novel question of law or policy and no remand would be likely. 47 C.F.R. § 1.301(b). *See also Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981) (judge may order witness to testify to diversification); *NLRB v. Phaostron Inst. & Elect. Co.*, 344 F.2d 917, 920 (D.C. Cir. 1965)(presiding judges in administrative proceeding have great latitude and discretion to regulate hearing procedures). Therefore, no interlocutory appeal will lie from the requirement to produce Ms. Mike as a witness.

MO & O at para. 9. Second, the ALJ denied the Wireless Request For Subpeona because (*id.*, at para. 10):

> the parties, including Wireless, were in a position to know, in the exercise of reasonable diligence,[5] that on June 11, 1991, Mike would be required to be available for testimony in Washington, D.C. No steps were taken to insure her appearance until Sunday, June 9, and no application for a subpoena was made until the day she was due to be in the vicinity of the courtroom, June 11, 1991. Counsel

also volunteered in candor that it was doubtful that Ms. Mike could be served with a subpoena in California in time to reasonably assure her appearance for testimony anytime during this week (*i.e.*, the week of June 10, 1991). The circumstance of a forthwith subpoena being served on a recalcitrant witness also posed a reasonable expectation of a motion to quash with the attendant disruption to the hearing and decisional schedule for this case. Finally, and of equal importance, the remaining two parties appeared with witnesses that they also had opposed making available for cross-examination. They were ready to have their cases heard and they had prepared for cross-examination of Wireless witnesses sometime between June 11 and June 14, 1991. It is disruptive and unfair to parties who are diligently prepared to go to trial to make a last minute accommodation for a dilinquent party. The equities did not warrant the issuance of a subpoena to Ms. Mike and the request of Wireless was denied.

[5] As indicated in a footnote to the *Order*, counsel were advised by telephone calls made to their offices by the Judge's Legal Technician that copies of the ruling were available to be picked up on the day of issuance, Thursday May 30, 1991.

However, Wireless counsel was not reached by telephone, and the ALJ was critical that counsel (a solo practitioner) had "no pre-set procedure in his office to communicate this important ruling" on May 30. *MO & O* at para. 4.

5. In addition to denying those two Wireless requests, the ALJ held that:

> Wireless has violated an *Order* to produce a material witness and has not exercised diligence in seeking to secure compulsory process. The grounds for dismissal are a violation of a lawful order, and for a failure to prosecute an application. *See Hillebrand Broadcasting*, 1 FCC Rcd 419 (1986), and *Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (Review Bd. 1989), *rev. denied*, 4 FCC Rcd 1991, *recon. denied*, 5 FCC Rcd 2906 (1990). *In Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990), the Commission affirmed dismissal of an applicant that had refused to present for cross-examination the sole owner of the corporate general partner and its 99% equity owner in defiance of the trial judge's order.

MO & O at para. 13. He went on to declare that (*id.*):

> the cavalier manner in which Wireless treated the Presiding Judge's *Order* by not immediately contacting Mike (or attempting to contact Mike immediately) and by failing to seek to secure a subpoena immediately so that service could have been made (or attempted) no later than Friday, May 31, 1991, requires dismissal.

APPEAL

6. Wireless appeals its dismissal on several grounds. It asserts that, inasmuch as Ethel Mike withdrew as a principal, even prior to the direct case exchange, and Wireless, in turn, abandoned its ownership/management integration proposal, the ALJ had no reasonable basis upon which to order Wireless to produce Mike as a witness. It contends:

> We are unaware of any law or regulation at this Commission which gives an ALJ unfettered discretion to require an applicant to produce a non-party witness. If such a principle existed, ALJ's would be free to require applicants they did not like to produce witnesses that could not be produced, thereby setting up easy dismissals. The adoption of such principle would inject a chill, if not a deep freeze, into the heart of administrative due process.

Appeal at 5. It further maintains that, although the ALJ demanded the appearance of Mike to testify on "the viability and *bona fides* " of the Wireless application, the ALJ had designated no specific hearing issue that called into question either of those matters. *See id.*, at 3-4. Even so, contends Wireless (*id.*, at 4-5; footnotes omitted):

> Ms. Mike is not under the control of Wireless' remaining principals. When Wireless learned about ALJ Sippel's ruling requiring her as a witness (ruling released only 8 days before the hearing), Wireless immediately sought to contact her. Wireless' remaining general partner, [Mirabel], only was able to reach her the Friday before the hearing; Ms. Mike communicated her unwillingness to voluntarily come to Washington to testify. Wireless did present a subpoena to ALJ Sippel on the day of the hearing, after he first indicated he would sign it, but with great pomp and ceremony he did an about face and refused to sign it.

Submitting that outright dismissal "is supposed to be a last resort," *id.*, at 2 (citing *Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968)), Wireless complains that "it was arbitrary, capricious and irrational" for the ALJ to dismiss its application. *Id.*, at 5.

DISCUSSION

7. We will grant the Wireless appeal. Although the Board is institutionally reluctant to overturn an order when a Commission ALJ has made a determination that an applicant's conduct is unacceptable to the orderly progress of a hearing, *see, e. g., Hillebrand Broadcasting, Inc.*, 102 FCC 2d 804, *recon. denied*, 102 FCC 2d 809 (Rev. Bd. 1985), *review denied*, 1 FCC Rcd 419 (1986), we are also aware that dismissal is an extreme remedy to be employed when an applicant's conduct is so disruptive, contemptuous, or prejudicial that no lesser measure will reasonably protect the proceedings. *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (1988), *cert. denied*, 109 S. Ct. 1539 (1988).

8. In the appeal before us, just as in the very recent *Sound Broadcasting, Co.*, FCC 91R-51, released June 24, 1991, the appellant was dismissed outright following a 50%, hearing-eve ownership amendment.[3] In both cases, the applicant quickly reported the withdrawal of its for-

mer principal and immediately tendered an amendment to reflect a new ownership structure, essentially unchanged except for the deletion of the former principal. However, in neither case did the presiding ALJ formally accept or reject the tendered amendment or seek further information from the amending applicant to assist in making the threshold determination as to whether acceptance was appropriate.[4] Rather, the ALJs in both cases expressed in dicta their personal reservations about the possible reasons for, and potential consequences of, the reported ownership change. *See, e.g., MO & O*, para. 9 (*reprinted supra*, para. 4). And, while the particular circumstances differ slightly, the applicants in both cases were dismissed without a determinative ruling on their ownership amendments because a witness that the ALJ apparently wished to have questioned about the ownership amendment was not present at the initial hearing session. Finally, and unlike the case of *Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990), there was in neither case a defiant and unremitting refusal to produce the witness deemed essential to the resolution of a specifically designated issue, a contemptuous situation we just squarely encountered again in *Carmel Broadcasting Limited Partnership*, FCC 91R-66, adopted July 19, 1991. *See also Carroll, Carroll & Rowland*, 4 FCC Rcd 7149 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2430 (1990).

9. But in the case before us, and as in *Sound Broadcasting*, we cannot perceive any open defiance of an order demanding the production of a witness; nor do we have a pattern of dilatory, disruptive, or recalcitrant conduct so sharply out of order as to absolutely compel dismissal. *Compare Comuni - Centre Broadcasting ; accord, Warren Price Communications, Inc.*, 5 FCC Rcd 2906, 2907 (1990)("The ALJ's discretion to control the conduct of the proceeding before him encompasses the discretion to dismiss the application of a party that burdens a proceeding by repeatedly failing to adhere to governing procedures.").[5] In fact, the *MO & O* under appeal does not dispute that Wireless counsel was in Florida on another case when the ALJ ruled that Wireless must produce its erstwhile principal; or that the remaining Wireless "general" partner did not conclusively report back from California until June 9 that the subject witness would not voluntarily travel to Washington, D.C. to testify; or that Wireless itself sought a subpoena on the morning of June 11 to compel the witness's appearance, notwithstanding the applicant's own view that the presence of its former principal was unnecessary to resolve any designated hearing issue.

10. With great respect for the discretion of a presiding ALJ to conduct the proceedings before him in a manner that conduces to an expeditious hearing of the case, *see Hillebrand Broadcasting, supra*, we believe that the absolute dismissal of the Wireless application does seem premature under all of the circumstances here presented. Though we do not gainsay the general discretion of a presiding ALJ to demand the appearance of any witness deemed critical to the resolution of a designated hearing issue, going to either *basic* or *comparative* qualifications,[6] we believe that dismissal should not be triggered unless the applicant has (1) clear and ample notice that a particular witness must appear personally at a hearing, with the specific reasons given therefor[7]; and (2) the applicant, with contempt or inexcusable sloth, plainly defies an order to produce a witness (or any other evidence considered probative).

11. According to the unchallenged factual representations, we do not find that Wireless was here plainly defiant of the forum or inexcusably slothful as to the appearance of Ethel Mike. It is, of course, apoditic that "Ms. Mike is not under the control of Wireless' remaining principals," *see supra* para. 6; and after reportedly making a good faith attempt, Wireless notified the ALJ only *five working days* after the release date of the earlier ruling that Mike would not willingly appear. *Id.* Moreover, there is no evidence here that the few days delay in eliciting a declination from Mike was a manifestation of laggardliness or *mala fides*. Indeed, Wireless alleges (without suggestion to the contrary) that it offered to pay Mike's appearance expenses; and, when Mike firmly declined, Wireless *two working days* thereafter did file a subpoena request, albeit reluctantly. We cannot fairly say that this conduct, standing alone, warranted absolute dismissal, for "the applicant's proffered justification for the failure to comply with the presiding officer's order" seems not especially unreasonable, at least under all of the facts we are shown, *see Comuni-Centre, supra* note 5; and consequently we do not find apposite here a need to "punish [an] abuse of the system." *See id.*[9] Whereas we appreciate that a partial delay was portended by Ethel Mike's refusal to appear voluntarily, the *MO & O* itself recognized that California service and, if necessary, enforcement of the subpoena through the federal courts would have been unlikely by June 11 under the best of circumstances. *MO & O*, para. 10. In that regard, we find that the dismissal is not much supported by the observation that "Monday June 10, 1991, passed without the Presiding Judge being made aware that a witness had refused to comply with his order to appear and testify. No effort was made to seek a subpoena for Mike's attendance." *Id.*, at para. 6 Expedition is important to both the Commission and the public, but expedition is not the *only* requirement of a full and fair statutory hearing. Even if Mike's failure to appear on June 11 had caused the need for a brief supplemental hearing session at a later date, a universal occurrence throughout all levels of the judicial system, the measured remedy on the pertinent facts as given, we are constrained to say, was at most the forthwith issuance of a subpoena, and not the instant dismissal of Wireless as a broadcast applicant.

12. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Seaside Wireless, Ltd., L.P. on June 20, 1991, as supplemented on July 1, 1991, IS GRANTED, and that its application (File No. BPH-880701MF) IS REINSTATED in this proceeding; and

13. IT IS FURTHER ORDERED, That the Motion to Supplement Appeal, filed July 1, 1991 by Seaside Wireless, Ltd. L.P. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Wireless also agreed to stipulate to a media diversification demerit, based on the media interests of its "limited" partner, Claude C. Turner, *MO & O*, para. 3, although the media interests of passive principals such as "limited" partners or "non-voting" shareholders are not ordinarily cognizable for diversification (or other comparative) purposes. *See, e. g., Doylan Forney*, 5 FCC Rcd 5423 (1990)(citing *Anax Broadcasting*, 87 FCC 2d 483 (1981)). The reason for this adverse stipulation by Wireless is unknown, except to note that "limited" partner Turner was apparently also disinclined to appear as a hearing witness. Wireless had earlier objected to the proposed cross-examination of Turner, an objection the ALJ sustained. *MO & O*, para. 3.

[2] Lee Mirabel is the *nom de theatre* of NBC network talk show hostess Rosalee E. Sell. Appeal at 1.

[3] For better or worse, the Commission's application processing rules were amended several years ago to freely permit ownership changes of up to 50% to an application already on file. *See* 47 CFR §§ 73.3571(b) and (j)(2).

[4] In both the instant case and in *Sound Broadcasting*, the presiding ALJs accepted the tendered ownership amendments for "reporting purposes" only, as if filed under 47 CFR § 1.65.

[5] In *Comuni - Centre*, the court affirmed the dismissal of an applicant, but monished the Commission to consider the following factors before delivering the terminal sanction of dismissal:

> 1) the applicant's proffered justification for the failure to comply with the presiding officer's order; 2) the prejudice suffered by other parties; 3) the burden placed on the administrative system; and 4) the need to punish abuse of the system and to deter future misconduct.

[6] In *Sound Broadcasting*, as here, the application amendment(s) appear to have generated similar questions in the minds of the presiding ALJ(s) as to the reasons for a former principal's last-minute withdrawal, and the potential consequences of that withdrawal on the applicant. Yet in neither case did those questions materialize in the designation of an actual qualifying issue. Moreover, it has been long held that a hearing issue should not be added upon "mere speculation," *CBS, Inc.*, 49 FCC 2d 743, 745 (Rev. Bd. 1974); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965); and *Spanish International Television Co., Inc.*, 2 RR 2d 853, 856 (Rev. Bd. 1964), but only upon the presentation of verified facts that create an inevitable public interest question. *See generally Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985). In that latter regard, and but for the fact that *Sound Broadcasting* was before the Board on what we likewise perceived to be a precipitate dismissal rather than on the rejection of an amendment, the nature of our action might have been different. *Compare Erwin O'Conner, supra*, 22 FCC 2d at 143 (need to modify or add issues one of six consideration factors in "good cause" test for post-designation amendments) *with Gross Broadcasting Co.*, 46 RR 2d 1091, 1097-99 (1979)("good cause" test should not be applied "rigidly" without consideration of equity, the peculiar facts of the case, and the ultimate public interest purposes of our procedural rules; late financial amendment accepted, subject to further hearing on the underlying finances).

[7] In its most recent *Proposals to Reform the Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 162 (1991), the Commission stressed again its desire that cases be heard on written cases and exhibits: "Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in the exhibits, is subject to a question of substantial decisional significance." *See also Adjudicatory Re-Regulation Proposals*, 58 FCC 2d 865, 866 (1976).

[8] While we do not necessarily agree with the ALJ's rationale in demanding the appearance of Ethel Mike, since the rather speculative questions propounded might equally obtain when *any* substantial ownership amendment is lodged, we reject the Wireless appeal where it argues, in essence, that the ALJ exceeded his authority or flagrantly abused his discretion in ordering her presence. *See* Appeal at 3-4. As we have said, the law affords the presiding ALJ great latitude in the structuring of a proceeding and in compiling a record that includes all relevant facts. In all but the most extraordinary circumstances "where it has been shown that there has been such a flagrant abuse of discretion as would likely require reversal of the Initial Decision and a hearing *de novo*, or where the interlocutory ruling raises far reaching and vital concerns to the public interest which could not otherwise be adequately protected," *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991), an appeal will not be entertained (unless permitted "as a matter of right" under 47 CFR § 1.301(a)). The Wireless arguments going to the ALJ's fundamental authority to order the appearance of Mike as a witness implicate neither of the aforestated grounds. Since Wireless has suffered dismissal, however, its appeal is automatically entertained under 47 CFR § 1.301(a)(1).

[9] Although we have held that Wireless does not appear to have exhibited contemptuous conduct in this matter, certain language in its appeal pleading before the Board does nonetheless evince a pronounced impudence toward both the ALJ, personally, and his various rulings. We do not believe that counsel's attitude, as reflected in that unprofessional pleading, colored ALJ's ruling under appeal, but we do believe that a respectful recognition of the ALJ's delegated trial function might more easily allay any possible suggestion of contumacy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

BART GONZALEZ File No. 63500-89-5-RPS
d/b/a Digital Paging

Notice of Apparent Liability for
Forfeiture for operating a
facility in an unauthorized
manner with respect to
Station KNKD553 in the
Public Mobile Service
at Amarillo, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1991; Released: August 2, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Bart Gonzalez d/b/a Digital Paging (Gonzalez) has filed a Petition for Reconsideration requesting rescission of a $1,610.00 forfeiture. *See Bart Gonzales d/b/a Digital Paging*, 5 FCC Rcd 4800 (Mob. Serv. Div. 1990) (*MSD Order*). For the reasons stated below, we are rescinding the $1,610.00 forfeiture.

II. DISCUSSION

2. On January 11, 1984, a construction permit was granted to T-Com, Inc. for Station KNKD553, operating on frequency 158.10 MHz at Amarillo, Texas. On September 10, 1984, FCC Form 403 was filed reporting construction of the station. On May 29, 1987, the Commission authorized the transfer of Station KNKD553 to Gonzalez. The station's authorization expired on July 1, 1988, a timely renewal application was not filed,[1] and Gonzalez continued to operate the station. On November 8, 1988, Gonzalez requested Special Temporary Authority (STA) to continue operating pending Commission action on an application for reinstatement of the expired authorization. On January 30, 1989, the MSD issued a Notice of Apparent Liability for Forfeiture in the amount of $1,910.00, finding that an apparent violation of Section 22.3(b) of the Commission's rules had occurred for operating Station KNKD553 in an unauthorized manner. On March 1, 1989, Gonzalez filed FCC Form 401 to reinstate his expired authorization. On March 9, 1989, the MSD granted the STA. Subsequently, in response to a request from Gonzalez, the MSD reduced the forfeiture to $1,610.00. *See MSD Order*.

3. Gonzalez in his Petition for Reconsideration argues that he reviewed Section 22.45 of the Commission's rules,[2] determining that public land mobile station (PLMS) licenses are valid for ten years, and, thus, concluded that because the authorization for Station KNKD553 was issued on January 11, 1984, the license was valid until 1994. Consequently, Gonzalez claims he did not willfully violate the Commission's rules. Gonzalez further points out that he is the smallest of five radio common carriers in the Amarillo market and is therefore under a financial hardship. In support of his claim, he attaches copies of his 1988 and 1989 Federal Schedule C tax forms, showing operational losses over the past two years totaling approximately $20,600.00. For these reasons, Gonzalez requests that the $1,610.00 forfeiture be rescinded.

4. After a careful review of the record now before us, we find merit to Gonzalez' claim that no forfeiture should be imposed. In 1983, the Commission extended all existing PLMS license terms five more years from the end of the license term specified in the outstanding authorization to implement the statutory changes extending maximum common carrier license terms from five to ten years. *See Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendments Act of 1982*, 48 Fed. Reg. 27251 (June 14, 1983) (*Licensing Procedures*). The Commission adopted Section 22.45 of the rules in *Licensing Procedures*. Footnote 11 of *Licensing Procedures* stated that: (1) non-cellular public land mobile rules specify a staggered schedule of months, on a service-by-service basis, on which licenses expire; (2) the year of renewal also is staggered on a service-by-service basis; and (3) existing licenses of the various PLMS services would expire on specific dates (depending on the type of PLMS service involved).[3] The order is silent on when to renew licenses granted after the effective date of the order. Rule section 22.45 itself can be read to support the interpretation urged by Gonzalez. The staff, however, has interpreted the rule to mean that all wireline licenses granted before July 1988 must be renewed on July 1, 1988. *See Public Notice*, Mimeo No. 2661 (released Apr. 21, 1988).

5. The initial authorization for Station KNKD553 was issued after the *Licensing Procedures* order, and Commission records do not show that there was any license issued to either T-Com or Gonzalez prior to July 1, 1988, indicating the expiration date of the license.[4] Because application of the renewal rule under the circumstances present in this case is unclear, we do not believe sanctions are appropriate. Consequently, we hereby overrule *Space Mark Communications, Inc.*, 5 FCC Rcd 6644 (Com. Car. Bur. 1990), to the extent that that opinion is inconsistent with this decision.[5]

III. ORDERING PARAGRAPH

6. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Bart Gonzalez IS GRANTED and that the forfeiture IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 22.11(b) of the Commission's rules provides in relevant part that an application for renewal must be filed between 30 and 60 days prior to the expiration date of the license sought to be renewed.

[2] Section 22.45, in pertinent part, provides:

> (a) Licenses will be granted for up to ten years. When a date is specified in paragraph (b) of this section, the license will be valid until that date in the year of expiration. When the Commission determines the public interest, convenience or necessity would be served by a shorter license period, the license will be granted for such period.
>
> (b) *License Termination.* Station licenses will expire on the dates listed below, in the year of expiration:
>
> Public Land Mobile (radio common carriers)--Apr. 1
>
> Public Land Mobile (wireline common carriers)--July 1

[3] In relevant part, the expiration dates of existing licenses were listed as follows:

Public Land Mobile (Radio Common Carriers)	April 1, 1989
Public Land Mobile (Wireline Common Carriers)	July 1, 1988

[4] The January 11, 1984 date was the date a construction permit for the station was first granted to T-Com. This authorization does not contain the date the station was first licensed nor does it contain the expiration date of the license.

[5] Notwithstanding this decision not to impose sanctions in this case, renewal applications for wireline radio common carrier licenses were due on July 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-143

Application for authority to acquire and operate facilities for direct service between the U.S. and Austria.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 25, 1991 **Released: August 2, 1991**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Austria by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-143 IS GRANTED, and US Sprint is authorized to:

a. utilize for service to Austria its previously authorized one-half interest in 60 64-Kbps circuits in the PTAT-1 cable;[1]

b. lease from Cable & Wireless and operate 60 circuits of DDP (droit de passage) facilities in the UK between the terminals of the PTAT-1 and UK-Germany 5 cables;

c. utilize the one-half interest in 60 64-Kpbs circuits in the UK-Germany 5 cable owned by US Sprint;

d. lease from Deutsche Bundespost and operate 60 circuits of DDP facilities in Germany between the terminal of the UK-Germany 5 cable and the Austrian border; and

e. use said facilities[2] to provide US Sprint's regulaly authorized services between the U.S. and Austria and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Austria and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Memorandum Opinion, Order and Authorization*, DA 89-940 released August 14, 1989, File No. I-T-C-89-084, 4 FCC Rcd 6279 (1989). All terms and conitions of that Order remains the same.

[2] US Sprint states that its correspondent in Austria has agreed to provide all required matching facilities, including one half of all costs associated in the lease of DDP facilities, and all matching cable facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

METRONET COMMUNICATIONS — File No. I-T-C-91-094

Application for authority to provide service between the U.S. and Mexico.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 25, 1991; Released: August 2, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Mexico by MetroNet Communications (MetroNet).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-094 IS GRANTED, and Metronet is authorized to provide lines of communications for the U.S. cellular telephone providers utilizing the point-to-point microwave facilities having a capacity of eight 2.048 Mbps digital channels between Brown Field, San Diego County, California and the U.S. Mexico border near and Tijuana.

3. This authorization is without commitment as to the Commission's action on MetroNet's application filed on June 17, 1991, pursuant to Title III of the Communications Act of 1934, as amended, to construct the necessary point-to-point microwave station at San Diego, California.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Metronet and its correspondent in Mexico and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-91-125

Application for authority to acquire and operate additional capacity in the Transcaribbean Cable System (TCS-1) cable.

ORDER AND AUTHORIZATION

Adopted: July 25, 1991; Released: August 2, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-125 IS GRANTED, and World Communications, Inc. (Worldcom) is authorized to:

a. acquire, by Indefeasible Right of User (IRU) basis from AT&T, activate and operate additional one-half interest in 10 Minimum Assignable Units of Ownership (MAUOs) in Segments G1, G2 and G3 of the TCS-1 cable;

b. acquire and operate any necessary connecting facilities in the U.S. and Puerto Rico; and

c. use said facilities to provide Worldcom's regularly authorized services between the U.S. and Jamaica and beyond.

3. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-140

Application for authority to acquire and operate facilities for service between the U.S. and the Peoples Republic of China.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 25, 1991; Released: August 2, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Peoples Republic of China (PRC) by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-140 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 90 voice-grade satellite circuits between San Ramon, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the PRC furnished by US Sprint's correspondent in the PRC;

b. use said facilities to provide US Sprint's regulary authorized services between the U.S. and the PRC and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in the PRC and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-S-P-90-006

Request for Declaratory Ruling
Concerning Section 310(b)(4) of the
Communications Act of 1934, as Amended

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1991; Released: August 2, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we address a Request for Declaratory Ruling filed by IDB Communications Group, Inc. (IDBCG) seeking a declaratory ruling that the following level of foreign ownership of IDBCG is consistent with the public interest and will not result in the revocation of or refusal to license, pursuant to Section 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §310(b)(4), the satellite earth station and microwave licenses held by or applications which may be filed by IDBCG's subsidiaries:

(a) 21.2 percent by Teleglobe International (U.S.), Inc. (TII (U.S.)), a subsidiary of Memotec Data, Inc., a Canadian corporation;

(b) 4.99 percent by Swissair Beteiligungen AG (Swissair), a Swiss entity; and

(c) such shares as may be held from time to time by aliens purchasing IDBCG stock on the open market, provided that total foreign ownership of IDBCG's stock will not, in the aggregate, exceed 49.9 percent.

For the reasons discussed below, we grant IDBCG's Request for Declaratory Ruling as it pertains to (a) and (b) above and defer consideration of (c).

II. BACKGROUND

2. IDBCG filed the subject Request for Declaratory Ruling on July 9, 1990 and an amendment thereto on August 14, 1990.[1] IDBCG states that, at present, 21.2 percent of IDBCG's common stock is owned by TII (U.S.), an affiliate of Teleglobe Canada, Inc. (Teleglobe), a Canadian telecommunications service provider. TII (U.S.) and Teleglobe are both ultimately wholly owned by Memotec Data, Inc. (Memotec), a publicly traded Canadian corporation. IDBCG further states that the Canadian government owns no stock in Memotec.

3. On April 27, 1990, IDBCG entered into a Stock Purchase Agreement with Swissair (Swissair Agreement), a Swiss joint stock company, a wholly owned subsidiary of Swissair, Swissair Transport Company, Ltd., also a Swiss joint stock company, to sell 4.99 percent of the common stock of IDBCG to Swissair through a private placement of newly issued stock. IDBCG states that Swissair's parent corporation is publicly held.[2]

4. Sale of 4.99 percent of IDBCG's stock to Swissair will result in 26.2 percent of IDBCG's stock being held by aliens. This exceeds the 25 percent level of foreign ownership benchmark specified in Section 310(b)(4) of the Act. IDBCG seeks a declaratory ruling that the proposed 26.2 percent level of foreign ownership is consistent with the public interest and will not result in the revocation of or refusal to license the satellite earth station and microwave licenses held by or applications which may be filed by IDBCG's subsidiaries.

III. DISCUSSION

5. Section 310(b)(4) provides that the Commission may refuse or revoke common carrier licenses to a company that is controlled by another company with foreign ownership in excess of 25 percent or which has any foreign officers or more than 25 percent foreign directors. [3] However, the statute allows the Commission discretion to permit foreign ownership in excess of 25 percent, foreign officers, or more than 25 percent foreign directors if such ownership and control is not inconsistent with the public interest. IDBCG asserts that its proposed level of foreign ownership is consistent with the public interest and fits within Commission precedent permitting greater than 25 percent foreign ownership.

6. IDBCG states that, while it holds various Section 214 authorizations, it holds no radio licenses. IDBCG further states that all of its officers and seven of its nine directors are U.S. citizens. IDB Communications Corporation, CICI, Inc. and CICI IBS, Inc. are the only IDBCG subsidiaries which hold radio licenses. None of these three subsidiaries has any foreign officers or directors according to IDBCG.

7. IDBCG notes that the Stock Purchase Agreement by which TII (U.S.) acquired 21.2 percent of IDBCG's stock (Teleglobe Agreement) prohibits TII (U.S.) or any of its affiliates from increasing its ownership of IDBCG stock unless such increase would not result in the risk of revocation or refusal of licenses, pursuant to Section 310(b)(4), held by IDBCG's subsidiaries. Therefore, TII (U.S.)'s ownership of IDBCG stock is frozen at a maximum level of 21.2 percent unless there is a further declaratory order permitting an increase in TII (U.S.) ownership. IDBCG states that it has no plans to seek such a declaratory order. IDBCG further notes that the Teleglobe Agreement specifies that TII (U.S.) may designate two individuals to serve on IDBCG's board of directors and that the board shall have no fewer than eight members.

8. IDBCG states that the Swissair Agreement prohibits Swissair or any of its affiliates from increasing their aggregate percentage ownership of IDBCG's stock above 4.99 percent unless IDBCG seeks and is granted a further declaratory order finding that such increased ownership would not be inconsistent with the public interest. The Swissair Agreement also provides that IDBCG will use all reasonable efforts to appoint as a member of its board of

directors one person designated by Swissair, so long as such person is reasonably satisfactory to IDBCG and a citizen of the United States.

9. IDBCG asserts that the Swissair investment will serve the public interest by enabling IDBCG to participate in a European telecommunications joint venture with a highly respected European corporation and providing IDBCG with new working capital. Such additional capital will support enhancement and expansion of IDBCG's service to the public.

10. In view of the foregoing, we find that the public interest does not require the refusal to license or the revocation of the licenses of IDBCG's subsidiaries because of the proposed 26.2 percent foreign ownership of IDBCG. This amount is a *de minimis* expansion (1.2 percent) beyond the statutory benchmark. Further, U.S. citizens will hold 75 percent of the positions on the IDBCG board of directors and all of the officers of IDBCG will be U.S. citizens. In addition, because all of IDBCG's subsidiaries are common carriers, the licensees of the radio facilities do not initiate or control the content of the transmissions. These facts place the instant request for declaratory ruling squarely within the bounds of Commission precedent.[4] Therefore, we shall grant IDBCG's request for declaratory ruling to the extent it addresses the ownership of 26.2 percent of its stock by TII (U.S.) and Swissair.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the IDBCG request for declaratory ruling IS GRANTED IN PART and we find that the public interest does not require the revocation of or refusal to license the radio licenses or applications of IDBCG's subsidiaries because of the ownership of 21.2 percent of IDBCG's stock by TII (U.S.) and 4.99 percent of such stock by Swissair.

12. IT IS FURTHER ORDERED that the portion of IDBCG's request for declaratory ruling pertaining to ownership of such shares as may be held from time to time by aliens purchasing IDBCG stock on the open market, provided that total foreign ownership of IDBCG's stock will not, in the aggregate, exceed 49.9 percent IS DEFERRED until further order of the Commission.

13. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Satellite Transmission and Reception Specialist Company (STARS) filed an Opposition to Request for Delaratory Ruling on September 19, 1990. IDBCG filed a reply to this opposition on October 5, 1990 and STARS filed a response to that reply on October 15, 1990. However, by letter dated June 17, 1991, STARS withdrew its opposition and reply. Therefore, we need not address these pleadings herein.

[2] According to IDBCG, the Confederation of Switzerland owns approximately 6.7 percent of the voting stock of Swissair's parent. Also, a number of the cantons which comprise the Confederation and cantonal banks own in the aggregate 9.8 percent, with no single canton holding more than 3.2 percent of the Swissair parent. In addition, a number of Swiss communes and municipalities hold an aggregate of 5.4 percent of the voting stock. The remainder of the voting stock is held by the public.

[3] Section 310(b)(4) of the Act provides that:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by
>
> . . .
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

[4] *See* GRC Cablevision, Inc., 47 FCC 2d 467 (1974) and LCI Communications, Inc., Memorandum Opinion and Order, released March 31, 1986, Mimeo No. 3491.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-008-LA

Application for authority to participate in the launch of the INTELSAT VI (F-5)

ORDER AND AUTHORIZATION

Adopted: July 25, 1991; Released: August 2, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-008-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, and updated on July 11, 1991, for authority to participate in the launch, positioning and in-orbit testing of the modified INTELSAT VI (F-5) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INTELSAT VI (F-5) was delivered from the manufacturer's facility by land transport and arrived at the launch site in French Guiana in early March 1991, and is scheduled to be launched on August 14, 1991, utilizing an Ariane 44L commercial launch vehicle. This satellite will replace the INTELSAT VI (F-2) at 335.5^0 East Longitude. The INTELSAT VI (F-2) will be moved to 60^0 East Longitude and serve the Indian Ocean Region Primary role. It is anticipated that the INTELSAT VI (F-5) will be in service by mid October 1991.

4. The estimated costs associated with the INTELSAT VI (F-5) are as follows (all amounts in real year dollars):

HAC Contract (including delivery price, engineering charges and amendments)	$136,072,000
HAC Launch Support	$ 1,700,000
HAC Performance incentives, capitalized	$ 11,560,000
HAC Performance incentives, expensed	$ 15,488,000
Arian Launch Vehicle and services	$ 81,963,000
TOTAL INTELSAT	$246,783,000
TOTAL COMSAT (based on current ownership share of 22.887%)	$ 56,481,953

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT VI (F-5) satellite to be positioned at 335.5 degrees East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VI (F-5) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 2, 1991

Richard R. Zaragoza, Esquire
Fisher, Wayland, Cooper and Leader
Suite 800
1255 23rd Street, N.W.
Washington, DC 20037

In re: KVFW(AM), Winfield, Kansas
File No. BAL-900806EA

Dear Mr. Zaragoza:

This is in reference to the above-captioned application for assignment of license of station KVFW(AM), Winfield, Kansas, from Valu-Broadcasting, Inc. to Johnson Enterprises, Inc. ("Johnson"). Johnson is also the licensee of KLEY(AM), Wellington, Kansas, and grant of the instant application will result in a violation of 47 C.F.R. Section 73.3555(a)(1) due to the overlap of the 5 mV/m service contours of both stations.[1] You seek a waiver of that rule so that Johnson may acquire KVFW(AM).[2]

In support of your waiver request, you state that only two commercial radio stations, KVFW(AM) and KWKS(FM), are licensed to Winfield, Kansas.[3] Due to financial difficulties, you assert that KVFW had been struggling for some time to stay operational but finally requested Commission authority to go off the air effective midnight, December 31, 1990. Consequently, Winfield is now faced with the loss of broadcast diversity and competition, and a concomitant loss of local programming. Since the station has been nonoperational, the Commission has received several letters from local residents and organizations expressing concern over the loss of a local broadcast voice. Of particular concern is the severe weather common to the area that purportedly makes the operation of KVFW critically important. The area, which is part of the Great Plains, is apparently prone to tornados, flooding and blizzards. KVFW, it is claimed, has been instrumental in the past as a valued source of news and emergency information during such periods of natural disaster.

You maintain that while the current licensee has made every effort to keep KVFW on the air and serving the local area, it finally had to recognize the deteriorating financial performance of the station and set out to find a buyer beginning in the fall of 1989. The President and Chief Executive Officer of the licensee has submitted a declaration to the Commission outlining all efforts made to sell the station. These efforts include listing the station with several brokers as well as running advertisements in both national publications and local newspapers. Initial responses were received from the print advertisements but no one pursued the matter further. Most indicated that they had no interest in acquiring a stand-alone, 250-watt AM facility. After a year's worth of effort, only Johnson advanced a firm and serious offer to buy the station.

Johnson maintains that it is acutely aware of the local needs and interests of the area. It has submitted an additional supplement to its waiver request outlining its plans for programming, staffing and operating KVFW in the event the waiver request is granted. Attached to the supplement is a declaration from Johnson outlining the proposed plans in each area. Briefly, Johnson intends to provide local news originating from the Winfield studio during significant blocks of time throughout the day. It also intends to respond to any local emergency or severe weather situation with appropriate announcements and information. Music programming and national network news will be provided by means of a microwave studio-to-studio link from KLEY in Wellington to the KVFW main studio. Since KLEY operates daytime only, however, KVFW programming would originate from the Winfield studio in the evening. Johnson also intends to provide programming dealing with local special events and local sports. Regarding staffing and operations, Johnson pledges to maintain a high profile in the community and to attempt to hire local people for positions in the programming and sales operations of the station.

With regard to the overlap of both stations, the engineering exhibit submitted with the waiver request demonstrates that the population within the overlap area, which measures 11.9 sq. kilometers/4.6 sq. miles, is approximately 954. This represents 6.1% of the population within the KVFW contour and 5% of the population within the KLEY contour. In terms of area, the overlap area comprises 1.9% of the area within KVFW's 5 mV/m contour and 0.8% of the area within KLEY's 5 mV/m contour.

You further argue that a unique factor to be considered in waiver cases of this type is the unusually high level of area ground conductivity in the south-central Kansas area. As you correctly observe, this area of the country, unlike other regions, is affected by exceptionally high ground conductivity. *See* 47 C.F.R. Section 73.190 (Figure R3). You further assert that the Commission has in the past recognized the propriety of waiving contour overlap caused by such high soil conductivity. *See, e.g., Radio Station WREN Co., Inc.*, 52 RR 2d 601 (1982); *Lesso, Inc.*, 52 RR 2d 722 (1982). You further assert that the distance between these two stations is appoximately 34.5 kilometers/21.4 miles, and one would not ordinarily expect overlap to be a problem, given the licensed parameters of these stations. Overall, you maintain that overlap exists due to signal conductivity levels that are at least three times greater than that in most other parts of the country.

Further, you contend that the Winfield and Wellington markets are separate and that the overlap area is well served by other broadcast stations. You represent that six AM and twelve FM stations serve the overlap area. Additionally, four television stations serve the area with Grade B coverage or better.

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73.3555 of the Commission's Rules*, 4 FCC Rcd 1723 (1989), *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989); *Multiple Ownership Rules*, 97 FCC 2d 997 (1984), *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where applica-

tion of fixed multiple ownership standards would be contrary to other public interest concerns. *See KRTH (AM)*, 5 FCC Rcd 2059 (1990); *Frank R. Jazzo, Esq.*, 3 FCC Rcd 1782 (1988); *Capital Cities Communications, Inc.*, 59 RR 2d 451 (1985). Before such a waiver can be granted, however, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

On the basis of the representations before us and the circumstances of this case, we find that a waiver of the overlap prohibitions contained in our multiple ownership rules would be consistent with the public interest. It is significant to our finding that the stations are located in separate markets, that the amount of overlap, although not *de minimis*,[4] is relatively small, as is the population within the overlap area, both in absolute terms and as a percentage of the total area and population within the stations' 5 mV/m contours. It is also significant that the size of the area is influenced by the unusually high level of ground conductivity, and, but for this fact, a waiver might not be required.[5] Additionally, KVFW is one of only two commercial radio stations, and the only AM station licensed to Winfield. It is currently nonoperational and, as only a 250-watt stand-alone AM station in a predominantly rural area, we find it unlikely that the station would be able to resume operations absent waiver. This judgment is confirmed by the fact that, although extensive efforts were made to seek another buyer, Johnson's proposal was ultimately the only one extended. Grant of its proposal would thus constitute the only plausible means to allow the station to once again serve the needs and interests of the Winfield community and would thus benefit the public interest. Furthermore, Johnson has extensively demonstrated its awareness of local programming needs and has committed itself to provide local programming tailored to the needs and interests of Winfield. Finally, the overlap area is well served by an abundance of other broadcast media.[6]

Based on the totality of the circumstances here, we find that a waiver of the contour overlap provisions of 47 C.F.R. Section 73.3555(a)(1) will not result in an undue concentration of the media and will not create any detriment to the policies underlying the rule. Accordingly, Johnson Enterprises, Inc.'s request for waiver of the contour overlap provisions of 47 C.F.R. Section 73.3555(a)(1) IS HEREBY GRANTED. Moreover, finding that the applicant is qualified and the public interest will be served, the application (File No. BAL-900806EA) for assignment of license of KVFW(AM), Winfield, Kansas, from Valu-Broadcasting, Inc., to Johnson Enterprises, Inc., IS HEREBY GRANTED.

This letter was adopted by the Commission on July 3, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 73.3555 states in pertinent part:

> (a) No license for an AM . . . broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and the grant of such license will result in:
>
> (1) Any overlap of the predicted or measured 5 mV/m groundwave contours of the existing and proposed AM stations . . .

[2] In the alternative, you seek a temporary waiver to acquire KVFW and to allow Johnson time to apply to modify the station's facilities in order to eliminate the prohibited overlap once the Commission lifts its current freeze on AM construction permit applications. *Review of the Technical Assignment Criteria for the AM Broadcast Service* (AM Freeze Order), 5 FCC Rcd 2136 (1990). In view of the fact that we find the grant of an unconditional waiver appropriate, it is not necessary to address in detail the request for a temporary waiver until an application eliminating overlap could be filed. It is entirely possible that an application sufficient to eliminate the prohibited overlap would not be consistent with any new technical rules adopted before the freeze is lifted, or, assuming such an application could be filed, that potential losses of existing service would outweigh the nominal benefits to the public interest from elimination of the overlap. Therefore, we decline to grant a temporary waiver based upon the speculative possibility that the overlap would ultimately be eliminated.

[3] Noncommercial educational station KSWC(FM) is also licensed to Winfield.

[4] You argue that the amount of overlap in question should be considered *de minimis* in nature because it is affected by the high level of ground conductivity in the area. The cases you cite referring to a *de minimis* standard were decided during a time when the contour overlap proscriptions for the AM service used the 1 mV/m standard. An appropriate case in which to find that contour overlap would meet a *de minimis* standard has not been before the Commission since it relaxed its rules in this area. *See First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). Although, as noted, the extent of overlap here is relatively small, it is not so insignificant as to be considered *de minimis*.

[5] The overlap area occurs in an area which has a ground conductivity of 30 mS/m, the highest conductivity recognized in the M3 conductivity map in our rules.

[6] The Commission presently has a docket pending which proposes a number of changes to our rules governing technical and operational standards in the AM radio service. *See Notice of Proposed Rulemaking* in MM Docket No. 87-267, 5 FCC Rcd 4381 (1990). The Commission also has a docket pending which proposes a number of changes to our ownership rules with respect to the radio industry. *See Notice of Proposed Rulemaking* in MM Docket No. 91-140, _____ FCC Rcd _____ (FCC 91-156, released June 7, 1991). Our decision to grant a waiver here should not be construed as precedent for any action we might take in either of those proceedings. This waiver grant is based solely on the present ownership rules and has no applicability in the absence of all of the unique circumstances presented in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990

REPORT AND ORDER AND REQUEST FOR COMMENTS

Adopted: July 11, 1991; Released: July 26, 1991

By the Commission:

I. INTRODUCTION

1. By this action, the Commission is amending its rules to require that each common carrier providing telephone voice transmission services shall, no later than July 26, 1993, provide, throughout the area in which it offers service, telecommunications relay services (TRS)[1], individually, through designees, through a competitively selected vendor, or in concert with other carriers. Further, we take this action in order to establish mandatory minimum standards for operational, technical, and functional procedures that shall be met in carrying out the requirement that common carriers provide the means for individuals with hearing or speech disabilities to engage in communication by wire or radio with individuals who do not have such disabilities in a manner that is functionally equivalent to the ability of individuals who do not have hearing or speech disabilities to communicate using voice communication services by wire or radio.

II. BACKGROUND

2. This proceeding was initiated by the passage of the Americans with Disabilities Act of 1990 (ADA), S. 933, Pub. L. 101-336,104 Stat. 327.366-69 (July 26, 1990). The ADA's purpose is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to ensure that federal entities such as this Commission play a central role in enforcing the standards established in the ADA on behalf of individuals with disabilities. Specifically, in Title IV, the ADA mandates that the Commission ensure that interstate and intrastate telecommunicationsrelay services are available, to the extent possible and in the most efficient manner, to individuals in the United States with hearing and speech disabilities. Title IV of the ADA adds Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq* ., (the Act). The intent of Title IV of the ADA is to further the Act's goal of universal service by providing to individuals with hearing or speech disabilities telephone services that are functionally equivalent to those provided to individuals without hearing or speech disabilities.

3. In order to fulfill the ADA's mandate, this Commission, on November 8, 1990, adopted a *Notice of Proposed Rulemaking (NPRM)* in this proceeding.[2] The *NPRM* proposed rules which implement the provisions of Title IV of the ADA. The ADA requires the Commission, within one year of the ADA's enactment, to prescribe necessary rules and regulations to carry out the requirements of Title IV, and prescribes that each common carrier providing telephone voice transmission services shall, no later than July 26, 1993, provide TRS. As an initial matter, the Commission proposed to permit carriers and states the time and flexibility to determine how best to comply with these new rules.

4. Sixty-one parties, made up of twenty-four state government entities, eight associations representing individuals with speech and hearing disabilities[3], eight trade associations, two equipment manufacturers, and nineteen common carriers submitted comments or reply comments in response to the *NPRM*. A list of those parties filing the fifty-one comments and twenty-seven replies is contained in Appendix A.

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[1] TRS are defined as telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. This term includes services that enable communications between the user of a Text Telephone (TT) or other nonvoice terminal device and an individual who does not use such a device. The term "Telecommunications Device for the Deaf" (TDD), widely used in the past, has become a misnomer both because it is but one type of TT that employs graphic communication in the transmission of coded signals through a wire or radio communication system and because of its use of the identifier "Deaf." The terms Telecommunications Relay Services, TDD, TDD Relay Service, TDD Service and Dual Party Relay Service have been used synonymously at times in the Americans with Disabilities Act and by many TRS providers. However, the prospective use of the terms TDD, TDD Relay Service, TDD Service and Dual Party Relay Service is inappropriate because it entrenches current technology, a result contrary to the intent of Congress. Therefore, TRS shall be the operative term for relay services. *See* paras. 6-7 *infra*.

[2] *See* Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990). The Commission designated Subpart F of Part 64 of its rules as the appropriate location for the rules implementing the ADA. Subpart F of Part 64 currently provides rules for "Furnishing of Customer-Premises Equipment and Related Services Needed by Persons with Impaired Hearing, Speech, Vision or Mobility."

[3] The National Center for Law and the Deaf (NCLD) comments incorporate the comments of seventy-one organizations representing and made up of individuals with hearing and speech disabilities.

III. DISCUSSION

5. The commenters were unanimous in strongly supporting the goals of the ADA and the efforts of the Commission in implementing the ADA in order to establish nationwide telecommunications relay services. Most of the commenters generally support the Commission's functional requirements, guidelines, and operational procedures for TRS; however, many commenters were divided on the precise requirements with regard to minimum operator standards, equal access, cost recovery mechanisms, and technical standards. Many commenters requested clarification of the proposed rules regarding confidentiality and call content, certification, complaint, and enforcement requirements. Based on the comments submitted in this proceeding and the specific requirements of Title IV of the ADA, we have addressed these issues *seriatim* and fashioned a comprehensive set of rules which (A) set forth terminology and definitions; (B) prescribe operational, technical, and functional minimum standards required ofall TRS providers; and (C) delineate the state certification process. The rules are contained in Appendix B and outlined below.

A. Definitions and Terminology

6. Several of the commenters, particularly those organizations of and for persons with hearing and speech disabilities, propose terminology which accurately describes the services and equipment utilized in TRS and at the same time promotes national understanding and acceptance of persons with disabilities. The proposed terminology replaces all references to "impairments" with "disabilities" and stresses "person-first" usage whereby a person described as a "hearing-impaired person" will be identified as "a person with a hearing disability." Further, in order to avoid entrenching current technology, a result clearly contrary to the intent of Congress, the American Speech-Language-Hearing Association (ASHA) proposes that all references to "TDD relay," or "dual party relay service" be replaced by the term "TRS." Additionally, commenters propose that the term "communications assistant" (CA) replace "relay operator" or "operator," "Text Telephone" (TT) replace TDD, and the term "conversations" supersede "messages" in order to emphasize spontaneity and functionally equivalent use of telephone services. Further, in the interest of clarity, the commenters propose definitions of the terms American Sign Language (ASL), Voice Carry Over (VCO),[4] Hearing Carry Over (HCO),[5] American Standard Code for Information Interexchange (ASCII), and Baudot. *See* Appendix B.

7. Since the ADA mandates that the Commission require common carriers to provide functionally equivalent telephone access to persons with hearing and speech disabilities, it is essential that we adopt uniform terminology to describe the specialized services, equipment, and consumers of TRS. In light of these factors, we agree with the commenters that these modifications to the proposed terminology in the *NPRM* will enhance understanding of TRS, the disabled community of TRS users and further the goals of the ADA. Therefore, we are adopting the modifications to definitions recommended by many commenters.

B. Mandatory Minimum Standards

Operational Standards

8. *Communications Assistant (CA) Standards.* The *NPRM* proposed general operating requirements which include operational, technical and functional standards. Most of the commenters support the establishment of unique CA standards to facilitate TRS functions because, today, relay services are labor-intensive, and accurate and meaningful standards therefore translate into cost savings. CA tasks are divided into three categories serving three types of consumers: (1) Text/Voice transliteration serves people with hearing and speech disabilities who require their typed conversation to be spoken by the CA and the other person's spoken conversation to be typed by the CA; (2) Text transliteration or VCO serves people with hearing disabilities who require words spoken to them to be typed by the CA; and (3) Voice transliteration or HCO serves people with speech disabilities who require their typed conversation to be spoken by the CA. Commenters concur that all CAs should be familiar with hearing and speech disability cultures and languages,[6] TT etiquette, and the unique syntax of ASL. Further, commenters agree that relay systems should transmit conversations between the TT and voice caller in real time.[7] Additionally, commenters urge that TRS callers should be provided with reasonably efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability will be comparable to the network availability a voice caller would typically experience in attempting to reach a party through the voice telephone network.

9. With regard to typing standards and training, comments and replies reflect concerns regarding the availability of CA applicants and the cost of training. Commenters note that available labor pools differ from region to region and restrictive entry level skills may inhibit carriers from providing functionally equivalent, widely available relay services. Thus, although some commenters recommend various entry level typing speeds and training standards, and the *NPRM* proposed a 35 wpm minimum typing level, we modify the proposed rules to require TRS providers themselves to be responsible for requiring that CAs be sufficiently trained so as to effectively meet the specialized communications needs of individuals with hearing and speech disabilities. We expect that CAs will be trained to deliver the level of service demanded by the ADA, including competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette. We realize that specialized needs (*e.g.*, foreign

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[4] VCO is a reduced form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice the conversation.

[5] HCO is a reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.

[6] Hearing and speech disability cultures and languages include ASL, Cued Speech, Fingerspelling, Manual English, Speechreading and Speech Amplification.

[7] Real time refers to actual time of transmission as opposed to delayed transmission or stored conversation relayed at a later time.

language needs) may change over time or with new technological advances. Rather than articulate a low threshold of expectations, a safe harbor, we instead expect that TRS providers will deliver the excellent level of service all telephone consumers demand. Competition among TRS providers to attract customers to the service also should spur providers to achieve the highest quality service.[8]

10. With regard to the training of CAs and emergency calls, many commenters, including the Utah Public Service Commission (Utah), Ameritech Operating Companies (Ameritech), National Association of the Deaf (NAD), and Pacific Bell and Nevada Bell (Pacific Bell), request clarification of this issue because of potential liability and overlap with 911 services. Because 911 services are covered by Title II of the ADA[9] and because we concur with commenters that CAs and providers should not be responsible for emergency calls and their resolution, we will require CAs to handle emergency calls like any other TRS calls. However, we encourage 911 services to provide facilities for direct TRS and TT calls and we strongly encourage TT and TRS users to access emergency 911 services directly.

11. *Confidentiality and Conversation Content.* The *NPRM* proposed that TRS CAs be prohibited from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call. Most commenters concur that the proposed rule, without clarification, raises issues of criminal or civil liability of relay providers and possible conflicts of law. In particular, NCLD, United Telecommunications, Inc. (United), Central Telephone Company (Central), NYNEX, OPASTCO, MCI, Bell Atlantic Telephone Companies (Bell Atlantic), National Telephone Cooperative Association (NTCA), UltraTec, Inc., (UltraTec) and several state commenters including Virginia, State Corporation Commission (Virginia), Washington, State Department of Social and Health Services (Wash), Indiana Utility Regulatory Commission (Indiana), Pennsylvania Public Utility Commission (Penn), and Colorado, The Deaf Organizations of (Colorado); as well as the Social Security Administration (SSA), concur that the intent of the ADA is to provide total confidentiality for relay calls regardless of content. However, most of these commenters propose that because Congress was unequivocal in its mandate that relay calls be kept confidential regardless of content, CAs and providers of TRS should be relieved from any and all liability for relaying calls.

12. Several commenters disagree with this interpretation and argue that the ADA does not mandate total confidentiality. For example, Oregon Independent Telephone Association (Oregon) argues that CAs should not be required to participate in obscene or harassing calls and Arizona Council of the Hearing Impaired (Arizona) contends that call content cannot be absolutely protected because criminal conduct in violation of public policy is not protected under state or federal law. Connecticut, State Department of Human Resources (Conn) proposes that after training on the legal parameters of obscenity and illegal calls, CAs would be able to use their own judgment to decide which calls to complete. Chillicothe Telephone Company (Chillicothe) argues that the proposed rule would make it difficult to attract and retain high quality trained CAs because of the delicacy of CA sensibilities. Deafness Education Advocacy Foundation, Inc., (DEAF) proposes an exception to the completion requirement of the ADA in circumstances where the called party is a non-consenting recipient of verbal sexual assault, and NTCA requests that we define the parameters of common carrier obligation to respond to subpoenas and testify under oath with regard to information gleaned in the course of TRS. Finally, we note that a number of states have recently enacted legislation addressing confidentiality and liability of CAs. For example, the legislatures of Tennessee and Texas have each enacted a statute that defines CAs as a conduit for the relayed conversation, prohibits the CA from disclosing or being compelled to disclose, through reporting or testimony or by subpoena, the contents of the conversation, and attaches a criminal penalty against any CA who discloses the contents of a conversation, unless the CA obtains the consent of each party to the conversation.[10]

13. Issues of confidentiality and liability are raised primarily by states and common carriers in cases where the carriers are required by state or federal law to report obscenity, harassment, child abuse, or criminal conversation. Relay services are unique in that, in the present technological environment, they utilize human CAs who see and hear private conversations while acting as transparent conduits relaying conversations without censorship or monitoring functions. Section 225(d)(1)(F) of the ADA requires the Commission to prescribe regulations that "prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call." Under this provision, CAs, consistent with the obligations of common carriers, may not divulge the content of any relayed conversation. The ADA prohibition of disclosure furthers the statutory purpose that TRS be functionally equivalent to regular telephone service. We believe that confidentiality is essential to the service, and that users of TRS can have confidence in the basic privacy of their conversations.[11]

14. We note that the ADA does not expressly address the relationship between its prohibition of disclosure and other statutes that permit or require disclosure. Section 705(a) prohibits disclosure of any telephone conversation except under limited circumstances related to law enforcement.[12] The ADA's legislative history offers little guidance on the relationship between the ADA's nondisclosure pro-

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[8] We intend to monitor closely, through the complaint process and otherwise, the actual quality of relay services. If experience shows that imposition of additional minimum standards is required, we will not hesitate to prescribe such standards.

[9] 42 U.S.C. § 12131 *et seq.*

[10] Legislature of the State of Tennessee, Oaths, Section 24-1-210 (July 1, 1990); Legislature of the State of Texas, House Bill No. 1132, Companion to SB No. 867, amending Section 1, Title 4, Human Resources Code, Section 82.001 (1991).

[11] *See, e.g.*, Section 705(a) of the Communications Act which itself generally prohibits any person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio from divulging the existence or content of a telephone call except through authorized channels of transmission or reception.

[12] Section 705(a) provides, in pertinent part, that "Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting

vision and Section 705. We, therefore, are guided by the principle that "repeals [of federal statutes] by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). Applying this case law, we find that there is no clear congressional intent to repeal the limited law enforcement exceptions to nondisclosure in Section 705 and that they, therefore, could apply to interstate and foreign relay service conversations.[13] We emphasize, though, that except for these very limited exceptions, CAs are prohibited from divulging the content or existence of any relay conversations,[14] and that these limited exceptions are, associated only with specific incidents of possible law violations, and will be extremely rare.

15. With reference to the liability and service obligations of CAs and providers of TRS, we believe that Congress, in adopting Section 225(d)(1)(E), intended relay operators to have the same service obligations as common carriers generally.[15] It is well established that the common carrier obligation to provide service upon request set forth in Section 201(a) of the Act is not absolute and does not necessarily apply to service for an illegal purpose.[16] As a practical matter, however, common carriers generally will not be criminally liable absent *knowing* involvement in unlawful transmissions. We have had occasion to address similar issues in connection with a different common carrier service." [A]lthough telephone common carriers do not appear to enjoy absolute immunity from liability if their facilities are used for an illegal purpose, there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." *Use of Common Carriers*, 2 FCC Rcd at 2820. In addition, we stated that carriers must be "knowingly" involved to be criminally liable. *Id.* We believe that CAs, in the normal performance of their duties, would generally not be deemed to have a "high degree of involvement or actual notice of an illegal use" or be "knowingly" involved in such illegal use. We also note that, as a practical matter, the extensive record in this proceeding suggests that actual incidents raising these questions will arise rarely, if ever.[17]

16. The *NPRM* proposed that CAs be prohibited from intentionally altering a relayed conversation. Most commenters concur that CAs should not be required to relayconversations verbatim where the user specifically requests summarization. We are persuaded by the comments that this exception has merit and modify the proposed rule accordingly.

17. *Types of Calls.* The ADA's mandate to make available to all individuals in the United States a rapid, efficient nationwide communications service, and to increase the utility of the telephone system of the nation, charges the Commission with ensuring that interstate and intrastate TRS are available, to the extent possible and in the most efficient manner, to individuals with disabilities. The proposed rules provide that relay systems be capable of handling any type of call normally provided by carriers, such as non-coin sent-paid, third party number, calling card and collect calls. We concur with Telocator that one-way paging service does not constitute telephone voice transmission service within the scope of the ADA. With regard to cellular carriers, however, we conclude that the ADA requires that TRS be provided by all common carriers engaged in voice transmission service by wire *or* radio.

18. Many commenters, including NCLD, Arizona, the Iowa Utilities Board (Iowa), and Ohio, Public Utilities Commission (Ohio), agree that relay services should be capable of handling any type of call normally provided by carriers when technically feasible and that the burden be placed on the common carrier to prove infeasibility. The community of persons with disabilities and many state

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in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority." Relevant exceptions under title 18, which are incorporated into Section 705, may include 18 U.S.C. Sections 2511(2)(a)(i) (wire fraud) and (ii) (electronic surveillance).

[13] We note that, by its terms, Section 705 applies only to interstate and foreign communications.

[14] Any state statutes that conflict with ADA disclosure provisions generally would, however, be preempted by the ADA to the extent they affect relay communications. *See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69 (1986); Capital Cities Cable v. Crisp, 467 U.S. 691, 698-99 (1984). In this regard, we believe that the Section 705 exceptions permitting disclosure in response to subpoena or "demand of other lawful authority" apply only to authorized requests by government officials in connection with specific incidents of possible law violations. Accordingly, state statutes imposing general affirmative disclosure requirements are not consistent with Section 705 and, therefore, the ADA.

[15] In adopting the final version of Section 225(d)(1)(E), the Conference Committee indicated that the provision "specifies that a relay operator is subject to the same standards of conduct that operators are subject to under the Communications Act of 1934." H.R. Rep. No. 558, 101st Cong. 2d Sess. at 78 (1990). As indicated in the Conference Report, the Senate acceded to the House amendment. That amendment added the words "failing to fulfill the obligations of common carriers by" to the Senate version of Section 225(d)(1)(E).

[16] Use of a telephone for an illegal purpose means use of a telephone to commit or further a crime. *See, e.g.*, Palermo v. Bell Telephone Co. of Pennsylvania, 415 F. 2d 298 (3d Cir. 1969); Delaware Sports Service v. Diamond State Telephone Co., 241 F. Supp. 847 (D. Del. 1965), *aff'd*, 355 F. 2d 929 (3d Cir. 1966), *cert. denied*, 385 U.S. 817 (1966); Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621 (N.D. Il. 1963), *aff'd*, 376 U.S. 782 (1964); Andrews v. Chesapeake and Potomac Telephone Co., 83 F. Supp. 966 (D.D.C. 1949); Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd 2819 (1987) (*Use of Common Carriers*) ; Humane Society v. Western Union International, Inc., 30 FCC 2d 711 (1971). As many of these decisions recognize, telephone common carriers are permitted to and often do have restrictions in their tariffs against use of their facilities for an unlawful purpose.

[17] Because Congress did not explicitly provide that the limited exceptions to nondisclosure of Section 705(a) and relevant provisions of the federal criminal code do not apply to CAs, there remains some ambiguity between those provisions and the ADA. We therefore urge that Congress clarify the language of Section 225(d)(1)(F) as to both confidentiality and liability.

commenters assert that "type of call" includes full and complete access to recorded messages, voice mail, remote polling of personal answering machines, 3-way calling and any other service normally provided by common carriers. AT&T and UltraTec concur that relay services should relay international calls that originate or terminate in the United States provided that equipment of the foreign country is compatible with U.S. equipment. Contel Cellular Inc. (Contel) and McCaw Cellular Communications, Inc. (McCaw) notes that the definition of common carrier in the ADA would appear to include cellular carriers. United States Telephone Association (USTA), Tennessee Public Service Corporation (Tenn), Kansas Relay Service, Incorporated (KRSI), Southwestern Bell Telephone Company (SWBT) and NYNEX indicate that no problems are encountered in interstate billing to calling cards and 3rd party numbers of interstate collect calls; however, these commenters concur with the exception in the proposed rule for coin-sent paid calls because of technical problems in rating the calls. [18] NYNEX concurs with USTA. Cincinnati Bell Telephone (CBT), and Tenn that all calls should be relayed except audiotext calls and coin-sent paid calls.

19. In order to maintain the functional equivalency standard mandated by the ADA, we modify the proposed rules to require that CAs are prohibited from failing to fulfill the obligations of common carriers by refusing single or sequential calls or limiting the length of calls utilizing relay services.[19] For the same reason, we require that TRS be capable of handling any type of call normally provided by the common carrier. The burden of proving infeasibility of handling any type of call will be placed on the carriers.[20] Questions will be addressed on a case-by-case basis.

Technical Standards

20. *ASCII vs Baudot.*[21] In the *NPRM*, the Commission proposed that TRS shall be capable of communicating with both ASCII and Baudot formats. Commenting parties noted that both ASCII and Baudot are currently in use by TT users and existing TRS. Many commenters propose that TRS should be capable of handling both ASCII and Baudot with encouragement towards a gradual shift towards ASCII. GTE Service Corporation (GTE) urges that the Commission phase out, over time, the use of Baudot. NAD contends that a phase-out period of three years is reasonable. Despite the fact that most TTs use Baudot, the consensus of commenters is that ASCII is a superior code because it allows use of personal computers as TT terminals, allows greater range of characters and, because it is a synchronous code, can be transmitted by standard computer modems without requiring special equipment. Although we are persuaded that a phase-out period for Baudot would be in the public interest since ASCII is, by all accounts, a superior technology, many persons who will rely on TRS have access only to Baudot terminals. ASCII devices are considerably more expensive than voice customer premises equipment, and we are reluctant to force Baudot users to purchase the more expensive equipment, especially if users have independent incentives to move to the more efficient technology voluntarily. Accordingly, while we urge both users and suppliers of TRS to facilitate the movement to ASCII, we will not deprive Baudot users of access to TRS. Therefore, we will adopt the rule as proposed.

21. *Speed of Answer.* The Commission, in the *NPRM*, proposed that 85% of all calls be answered within 10 seconds and that relay service begin within 30 seconds of answering. Thus, for 85% of all calls, the actual transfer of information begins within 40 seconds. These speed of answer criteria apply only to TRS, and are independent of network performance. In general, the common carriers commenting on this issue favor some relaxation of the proposed answer time, while other commenters either concur with the proposed rule or request more rigorous response requirements. New York State Telephone Association, Inc. (NYSTA) asserts that, within the speed of answer time requirement, time should be allocated for CA explanation of TRS to first time relay service users. No evidence has been presented to persuade us that the rule, as proposed, is neither feasible nor clear. We therefore conclude that our proposed standard will best meet our goal of providing relay services which are functionally equivalent to voice telephone services. Accordingly, we adopt the rule as proposed.

22. *Equal Access to Interexchange Carriers (IXCs).* The Commission, in the *NPRM*, proposed that TRS users should have access to their chosen IXC, and to all other operator services, to the same extent that such access is provided to individuals without speech and hearing disabilities. The NCLD and several carriers and state commenters concur with the proposed rule. Others, including AT&T, BellSouth Corporation (BellSouth) and Southern New England Telephone Company (SNET) argue that while it is an appropriate industry goal to provide relay customers access to the IXC of their choice, it may be difficult in the short term to offer this choice because it would not be economically or technically feasible. However, BellSouth suggests that new systems could be required to offer such access. Beehive Telephone Co., Inc. (Beehive), which provides relay services through its 800 numbers, proposes that the Commission specify AT&T as the carrier of last resort. AT&T contends that since the ADA requires all carriers to provide relay ser-

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[18] Hearing disabled pay phone users are unable to hear operator requests for additional coins as needed and are disconnected because operator requests for additional coins are not channeled through the CA. We note that recent technological advances may permit relay pay phone consumers to receive visual display messages from operators thereby eliminating this problem. Therefore, we conclude that there is no basis for a general exclusion of this type of telephone call from the requirements of the ADA.

[19] *See supra* para. 15, and nn. 15-16.

[20] The provision of "enhanced" services offered by common carriers is not required under this provision, but provision of such services is encouraged if technically feasible. All commenters agree that the language of the ADA and the proposed rules permit providers of TRS to decline to complete a call because credit authorization is denied. We concur with this interpretation.

[21] The Baudot format predates ASCII and employs a seven bit (a bit is the smallest unit of binary information) code, only five of which are information bits. Generally, Baudot TTs operate at the rate of 45.5 baud, which corresponds to 45.5 bits per second. The ASCII format employs an eight bit code, all of which are information bits. TTs using ASCII can operate at any standard transmission baud rate including 300, 1200, 2400, and higher. Personal computers with modems can be used as ASCII TTs in order to connect with TRS.

vices, customers will have the opportunity to use interexchange TRS of their preferred carrier. A third group of commenters, including USTA, Virginia, Central, Tenn and California, Public Utilities Commission (Cal), request that the Commission defer any such requirement until a later time because it is not feasible for some states or carriers which have implemented relay services via a bidding process where one IXC or entity has elected to assume relay responsibility. Many of these commenters assert that this lower overall cost (via the bidding process) outweighs any of the advantages of equal access. If the proposed rule is adopted, these commenters argue, they will be forced to renegotiate existing relay service contracts, a process which is costly, time consuming and could result in higher operational cost. Based on the comments, we will adopt the rule as proposed. States that have contracted with an IXC or other entity to provide interstate TRS may, at the time they apply for state certification of their TRS program, request a limited exemption from this rule by providing sufficient justification, including documentation of the contract, in their state application.

23. *TRS Facilities.* In the *NPRM*, the Commission proposed that TRS shall operate every day, 24 hours a day, and systems shall have adequate redundancy features, including uninterruptible power for emergency use, to assure continuity of operation. The ADA specifically provides that services operate every day for 24 hours per day and charges the Commission with the task of establishing minimum standards for achieving such service. Alexander Graham Bell Association for the Deaf, Inc. (AGB), in its comments, proposes that TRS should operate during power outages. Additionally, many commenters suggest that TRS facilities include adequate space and parking to accommodate CAs and management personnel, and that an outreach office be maintained to handle consumer complaints and inquiries. On the other hand, many state commenters request that we leave a great deal of flexibility to TRS providers in fashioning TRS facilities to meet the needs of the providers and the public. We have no basis for believing that TRS facilities generally will not be well designed and maintained. Therefore, we will not prescribe specific requirements for TRS facilities. However, as mandated by the ADA, we will require that TRS operate every day for 24 hours per day and that TRS providers maintain an auxiliary source of power which is functionally equivalent to normal central office auxiliary sources of power so that TRS continue to function during power outages.

24. *Technology.* All of the commenters were unanimously in favor of introducing new technology into TRS as it becomes proven and available. In its comments, Fon-Ex, Inc. (Fon-Ex) contends that it has developed a technology that is capable of providing relay services on an automated basis. As noted in the *NPRM*, automated systems have the potential of providing relay services in an efficient manner; however, at this time, speech to text conversion is still in the developmental stage. With regard to technologies already in use in several TRS, the associations representing persons with hearing and speech disabilities concur that implementation of VCO and HCO[22] would result in tremendous savings both in time and cost to complete a conversation. Further, in its comments, Self Help for Hard of Hearing People, Inc. (SHHH) asserts that VCO and HCO directly link the caller and the call recipient in a functionally equivalent manner which reduces the average length of calls, and results in lower blockage rates. In order to enhance a more natural conversational flow and to lower average TRS costs, it is strongly recommended by these commenters that VCO/HCO be incorporated as a standard TRS technical requirement. In the *NPRM*, the Commission stated that no regulation set forth in its rules is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications services to the disabled. We are persuaded that VCO and HCO, which are currently part of TRS in many states, are essential to implement functionally equivalent TRS. Therefore, we modify the proposed rules and require VCO and HCO technology to be standard features of TRS. The burden of proving infeasibility of implementing VCO and HCO will be placed on the carriers.

Functional Standards

25. *Complaint and Enforcement Procedures.* The Commission, in the *NPRM*, proposed specific rules regarding referrals, jurisdiction and filing procedures for resolution of complaints alleging violations of proposed Section 64.605 of the rules. The ADA requires that the Commission resolve, by final order, a complaint alleging violation of this section within 180 days after the date such complaint is filed. Many commenters including Conn, Colorado, NCLD, and NYNEX concur that relay users should have access to a CA supervisor regarding on-line complaints via a separate consumer, toll-free hotline. Most state commenters propose that all TRS have a well publicized complaint procedure instantly available to any caller whose conversation is not completed by a CA. Many commenters representing persons with hearing or speech disabilities propose that individuals responsible for handling complaints should be individuals with disabilities and that a consumer advisory committee should be established to regulate the actions of TRS providers. Other commenters, particularly states which have already established relay services, and many of the carriers, propose that the Commission permit TRS providers great flexibility in determining how they will comply with the ADA and Commission rules. Commenters concur that TRS providers should be required to provide relay consumers with the same opportunity to file and be heard on complaints and enforcement issues as are voice consumers.

26. With regard to the complaint resolution process, NCLD asserts that, in the case of a complaint which the Commission refers to a state, the proposed rule fails to specify the amount of time the Commission may have to refer the complaint to the state. NCLD contends that this is a critical point of reference because, under the ADA, the 180-day period for a state to act on a complaint only begins to run after the state receives the complaint. Therefore, NCLD proposes that the Commission require that its referral of a complaint to the states occur within five business days. Second, NCLD proposes that the Commission's prescribed complaint procedure be expanded to include those situations where a state receives a complaint directly from an individual, rather than as a referral from the Commission. Finally, NCLD proposes that the Com-

[22] *See supra* nn. 4-5.

mission specify the precise Commission office to whom TRS complaints should be directed in order to avoid consumer frustration and misinformation.

27. We have considered the various comments and agree with the commenters that relay consumers should be afforded the same opportunity to file and be heard regarding complaints and enforcement issues as are all other telephone consumers.[23] Additionally, we are persuaded that a clarification of the referral procedure is warranted. Therefore, we adopt the proposed rules with the following modifications: we include the name of the Commission office which will process TRS complaints and expand our complaint procedures to include those situations where a complaint is sent directly to a state. Moreover, the Commission will assure that these complaints are referred to the states expeditiously.[24]

28. *Public Access to TRS Information.* The Commission, in the *NPRM*, proposed that carriers, through publication in their telephone directories and otherwise, shall ensure that callers in their service areas are aware of the availability and use of TRS. In its comments, NCLD strongly advocates that relay services information be available in all telephone directories and through all directory assistance services offered in a given area. Further, NCLD proposes that TRS information be available in the form of written notice to the media, including television, radio and newspapers, and include information regarding availability and use of service, at least one time within 30 days after the effective date of July 26, 1993. Additionally, NCLD proposes that TRS information be included in carrier billing inserts to all subscribers, at least one time each year for the first three years of TRS operation. Colorado proposes that TRS providers be responsible for the distribution of information regarding TRS. We believe that public access to information regarding availability, use of service, and means of access, is critical to the implementation of TRS. Based on the comments, we modify the language of the proposed rules to include guidelines for the publication and dissemination of TRS information. Specifically, carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TT numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of TRS.

29. *Rates.* In the proposed rules, the Commission provides that TRS users pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination. This requirement mirrors the language of the ADA. NCLD, in its reply comments, raises the question of toll discounts for long distance TRS calls. NCLD supports the comments of AT&T, Chillicothe, and USTA in their recognition that discounts for TRS users are not unprecedented and that it is unfair to ask relay users to wait until a reliable calculus has been developed before requiring discounts. NCLD proposes mandatory discounts to offset the inherently lengthier duration of TRS calls. NCLD concurs with several states including Cal, Ohio, Indiana and Florida, Public Service Commission (Florida), which request assurances from the Commission that they will be permitted to require toll discounts by carriers who provide TRS in their states. Three methods of calculating a relay discount have been proposed by parties to this proceeding, any of which would be supported by NCLD: (1) USTA proposes determining an adjustment factor by comparing the speed of transcription ultimately required with the prevailing speed of voice communications, *i.e.*, higher typing speed = overall cost savings; (2) Cal proposes that AT&T's discount rate should be the minimum industry standard; and (3) Florida proposes that samples, taken at relay centers currently in operation, could be used to develop a factor for rating relay calls. In light of the delay factor inherent in TRS, NCLD strongly recommends that the Commission mandate toll discounts by July of 1993 and that these discounts should apply to the caller regardless of where the caller is when using the system, and not be limited to TT users, but be applicable to voice TRS and TT relay users.

30. We conclude that we do not have sufficient evidence to mandate toll discounts for long distance TRS at this time as part of our mandatory minimum standards. However, in order to provide this infant service and its providers with flexibility, in addition to requiring that TRS providers charge TRS users rates no greater than the rates paid for functionally equivalent voice communication services, we encourage IXCs to offer toll discounts to consumers as a competitive feature of service.[25]

31. *Cost Recovery and Jurisdictional Separation of Costs.* Section 225(d)(3) of the ADA mandates that the Commission prescribe regulations governing the jurisdictional separation of costs for TRS. The Commission, in the *NPRM*, proposed that, where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to Section 410 of the Act. The proposed rules provide that costs caused by interstate TRS shall be recovered from all subscribers for every interstate service and costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In their comments, the majority of commenters concur that existing accounting and separations rules are adequate to deal with interstate relay services and that a Joint Board proceeding is unnecessary and would substantially delay the implementation of TRS. Specifically, Ameritech, Pacific Bell, Texas Telephone Association (TTA), SNET, and SWBT contend that Parts 32, 36 & 69 of the Commission's rules are adequate to handle accounting and separations issues raised by the introduction of TRS. Further, SWBT states that there are two ways that relay services costs could be handled under the interstate accounting, separations and recovery rules: (1) if services are provided as non-regulated services or under contract, those costs will be removed prior to separations and will be recov-

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[23] Access to a supervisor regarding on-line complaints via a separate toll-free hotline is one method by which TRS providers may fulfill the requirement to provide TRS users with functionally equivalent consumer access.

[24] As with formal complaints under Section 208 of the Act, a Section 225 complaint proceeding will be treated as a restricted proceeding under our *ex parte* rules. *See* 47 C.F.R. Section 1.1208.

[25] States are permitted to exceed the minimum standards with regard to rates, by requiring toll discounts by carriers who provide TRS in their states. *See* Appendix B, Section 64.605(b)(3).

ered via non-regulated or contract rates; or (2) the services must be provided as tariffed services, which are subject to jurisdictional assignment of costs and will be distributed between interstate and intrastate based on relative usage. However, several state commenters, including Virginia, and Texas Public Utility Commission (Texas), expressed concern that the existing rules do not apply to non-regulated carriers. Similarly, Alabama, Public Service Commission (Alabama), Maryland, Public Service Commission (Maryland), and Rochester Telephone Corporation (Rochester) contend that current rules would create undue burdens on Local Exchange Carriers (LECs) and would fail to recover costs from all interstate subscribers.

32. In their reply comments, the New York Senate (NY Senate) and the New York, State Department of Public Service (New York) urge the Commission to establish procedures promptly for cost recovery of interstate TRS because New York's interstate relay is currently experiencing fiscal problems. In its comments, NCLD proposes that, in order to extend universal telephone service to relay users, TRS costs should be treated as part of the cost of basic telephone service, integrating TRS costs into the normal operating expenses. Because this method would provide a flexible funding source which can fluctuate with costs of operations, it would eliminate the need for labelled relay charges on phone bills, and it allows costs to be distributed across all ratemaking proceedings. With regard to interstate costs, NCLD, Competitive Telecommunications Association (CTA) and District of Columbia, Public Service Commission (DC) support the concept of administering interstate costs through a centralized entity such as the National Exchange Carrier Association (NECA) and concur with many commenters that such an entity should be required to account to governmental bodies for funds under its charge, and provide speech and hearing disabled consumers direct access, via a TT line, to its offices.

33. In its reply comments, NECA notes that most parties commenting on this issue agree that the Commission's current separation rules are adequate. However, NECA is concerned that Part 36 will not apply to non-exchange carrier TRS providers. NECA favors an approach in which TRS providers would be reimbursed by NECA for interstate relay costs on the basis of a fixed amount for each relay call-minute, set annually and based on total projected service demand. This method would provide carriers with incentives to obtain large volumes of traffic, which they can only do if the price, quality and features of their services are attractive to TRS customers. NECA is currently responsible for administering a similar settlement mechanism for "average schedule" LECs. About 700 LEC study areas receive interstate settlements based on formulas (demand variables such as line counts or access minutes to simulate a full-scale study of LECs' costs), which are submitted annually to the Commission for approval. NECA asserts that it could gather data on interstate relay costs from a sample of relay centers and propose formulas based on those costs. If the Commission adopts this approach, NECA proposes that it will not itself be liable for any shortfalls in revenues, and states that criteria would need to be established for determining eligibility for receiving such settlements. The National Association of Regulatory Utility Commissioners (NARUC), in its reply comments, proposes that the Commission proceed with implementation of interstate relay services and if the Commission determines that costs are being misallocated, that the Commission refer the allocation issue to a Joint Board for further revisions of the rules.

34. It is not clear from the record how TRS ultimately will be provided by various carriers, what state programs will seek certification, what the costs of TRS will be and how these costs could best be recovered. In order to achieve the goals of the ADA without unnecessarily disrupting TRS as currently provided, we find at this time that current separations rules are adequate. Moreover, in order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on subscribers' lines. However, the record is not adequate to determine a specific cost recovery mechanism at this time.

35. Therefore, we seek specific proposals from interested parties on cost recovery to be submitted to the Common Carrier Bureau no later than sixty days from the release date of this *Report and Order*. Responses to these proposals should be filed not later than 30 days thereafter. All proposals and other comments must reference CC Docket No. 90-571. In particular, parties should address various proposed funding mechanisms and both the advantages and disadvantages of each proposal, including relative administrative costs of various mechanisms, the likely relative costs that would be borne by various interstate carriers under each proposal, and the impact on quality, if any, of the proposals. We note that in this proceeding some commenters have argued that the costs associated with interstate relay services should be shared. These commenters must make a well reasoned showing that self-funding would be inappropriate. We are also especially interested in learning about different possible funding mechanisms from the experiences of the states.

C. State Certification

36. The ADA requires that common carriers providing voice transmission services provide TRS no later than July 26, 1993 and that common carriers will be considered in compliance with this mandate by providing, in compliance with the Commission's rules, intrastate and interstate TRS in any state that does not have a certified program; or by providing TRS, in compliance with the program certified under the Commission's certification rules, in a state that has a certified program. With regard to state certification, Section 225(f) of the ADA requires that a state choosing to establish a TRS program provide documentation to the Commission describing the program for implementing intrastate TRS and the procedures and remedies available for enforcing any requirements imposed by the state program. After the Commission reviews this documentation, the ADA provides that the Commission shall certify the state program if the Commission determines that the program makes available to individuals with hearing or speech disabilities, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate TRS in a manner that meets or exceeds the requirements of regulations prescribed by the Commission in its rules. Further, the ADA requires that the Commission determine that the program makes available adequate procedures and remedies for enforcing the requirements of the state program. The ADA grants the Commission the power to suspend or revoke such cer-

tification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. However, in a state whose program has been suspended or revoked, the Commission shall take necessary steps to ensure continuity of TRS.

State Documentation

37. Many commenters, particularly the states, request clarification of the proposed rules regarding specific documentation procedures and they express concern as to whether they will have adequate time to prepare such documentation. In light of these comments, we clarify the proposed rule on documentation to provide that documentation from the states shall be filed not later than October 1, 1992, prepared in narrative form, by the office of the governor or other office of the state empowered to provide TRS, and addressed to the Federal Communications Commission, Chief, Common Carrier Bureau, TRS Certification Program. All documentation submitted shall clearly describe the state program pursuant to the documentation requirements in the ADA. The Commission shall give public notice of the filing, including notification in the Federal Register, in order to inform the public of the states seeking certification.[26] The certification process requires no fee and certification shall remain in effect for five years. One year prior to the expiration of certification, a state may apply for renewal of its certification, and such renewal process will proceed in the same manner as certification, *i.e.*, documentation of the state program pursuant to the requirements of the ADA.

Requirements for Certification

38. Most commenters concur that certification of states is a reasonable approach to nationwide TRS, provided that adequate time is given for states either to meet the requirements or to correct deficiencies. Pursuant to the ADA, the Commission, through the documentation procedure, will determine if a state program meets the requirements prescribed by the Commission. States applying for certification must submit documentation which:

(1) establishes that they meet or exceed all operational, technical and functional minimum standards contained in Appendix B under "Mandatory minimum standards";

(2) establishes that the program makes available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) where a state program exceeds the mandatory minimum standards, the state must establish that its program in no way conflicts with other federal laws.

Suspension or Revocation of Certification

39. In its comments, NCLD proposes that consumers be permitted to participate in revocation proceedings and that specific time lines are necessary for such proceedings. NAD proposes that unacceptable performance by state TRS should be treated as a violation of contract and that penalties should be substantial. NYNEX argues that the Commission should not deny, suspend, or revoke certification for any reason beyond those delineated in the rules. We have considered the various comments and have concluded that the proposed rule on suspension or revocation of certification ensures that TRS users have notice and opportunity for hearing of such proceedings and provides for the continuation of TRS in the event that suspension or revocation of state certification results. Therefore, we will adopt the rule as proposed.

State Options

40. We concur with the state commenters and commenters representing persons with disabilities that many features beyond the mandatory minimum standards contained in the Commission's rules exist and may be incorporated by state TRS programs. Many commenters support the staffing of TRS with a number of CAs who have fluency in the dominant foreign language of their particular state. Similarly, many commenters request that TRS providers hire a sufficient number of male and female CAs in order for the TRS users to convey, through the CA, the appropriate tone of voice for personal or business conversations. TRS providers may consider providing these additional features in their service programs.

41. In its comments, BellSouth contends that it is essential to include continuing input from the speech and hearing disabled community. The Connecticut, State Office of Consumer Counsel (Conn OCC) concurs and emphasizes the need for involvement of this community at some level of the administration, management and operation of relay services. Further, UltraTec states that with regard to consumer participation, TRS should not handicap, intrude or control; rather they should empower individuals. We encourage all TRS providers to both include input from all consumers in implementation of TRS programs, and establish consumer advisory committees or boards, staffed at least partially by members of the speech and hearing disabled community. Additionally, in several states where TRS are available,[27] state programs supply TT equipment to persons with hearing and speech disabilities. In its reply comments, the American Foundation for the Blind (AFB) proposes that TRS providers explore ways in which telebraille equipment can be financed or loaned to persons who have vision and speech/hearing disabilities. We encourage other states to consider such equipment distribution programs.

42. Several commenters addressed the issue of whether there should be a single, nationwide number for TRS access. Many commenters, including Colorado, DEAF, Minnesota Public Utilities Commission (Minnesota), Wisconsin Department of Administration (Wisconsin), NCLD, and Indiana recommend that TRS should be accessed via a toll-free 800 number, preferably one established by Bellcore who administers the North American Numbering Plan. In its reply comments, NCLD notes that relay centers accessed by an 800 number may not be able to access other 800 numbers. We have reviewed the comments and studied the issue of a uniform access number for TRS and have determined that Bellcore has universally reserved 800-855-XXXX for TRS. However,800 numbers are assigned to a particular carrier and this poses

[26] Upon our release of the public notice, the certification proceeding will be treated as a non-restricted proceeding under our *ex parte* rules of 47 C.F.R. Section 1.1206.

[27] In thirty-one states some type of TRS are available. In 18 other states, TRS are operated privately.

feasibility issues in the assignment of this universally reserved 800 number. Therefore, while we do not find it feasible at this time to establish a single, nationwide number for TRS access, we encourage state systems and all other relay providers to use numbers that are easy for consumers to remember and would further the goal of nationwide access to TRS.

43. *Other Matters.* In the interest of clarity, certain editorial changes to the rules are being made as set forth in Appendix B.

44. *Conclusion.* We encourage states and carriers to move expeditiously in translating these mandatory minimum standards into operational relay services. They promise to enrich the lives of both persons with, and persons without, disabilities.

IV. PROCEDURAL MATTERS

45. *Final Regulatory Analysis:* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, *et seq.*, the Commission's final analysis in this *Report and Order* is as follows:

I. ***Need and purpose of this action:***

This *Report and Order* amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, *inter alia*, adds Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to persons in the United States with speech and/or hearing disabilities.

II. ***Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:***

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. ***Significant alternatives considered:***

The *Notice of Proposed Rulemaking* in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its *Report and Order* to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended.

V. ORDERING CLAUSES

46. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Parts O and 64 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective 60 days after publication in the Federal Register.

47. It is Further Ordered, That specific proposals from interested parties on cost recovery shall be submitted to the Common Carrier Bureau, referencing CC Docket No. 90-571, no later than 60 days from the release date of this *Report and Order*, and responses to these proposals shall be filed not later than 30 days thereafter.

48. It is Further Ordered, That authority is delegated to the Chief, Common Carrier Bureau to implement the state certification and complaint process provided in the rules adopted herein, and to review specific proposals on cost recovery mechanisms submitted by interested parties.

49. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall (a) make copies of this *Report and Order* available to members of the public and (b) shall cause a summary of this *Report and Order* to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this *Report and Order* to each state utility commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

Alabama, Public Service Commission

Alexander Graham Bell Association for the Deaf, Inc.

American Speech-Language-Hearing Association

Ameritech Operating Companies

Arizona Council of the Hearing Impaired

AT&T

Beehive Telephone Co., Inc.

Bell Atlantic Telephone Companies

BellSouth Corporation

California, Public Utilities Commission

Central Telephone Company

Chillicothe Telephone Company

Cincinnati Bell Telephone

Colorado, The Deaf Organizations of

Competitive Telecommunications Association

Connecticut, State Department of Human Resources

Contel Cellular Inc.

Deafness Education Advocacy Foundation, Inc.

District of Columbia, Public Service Commission

Florida, Public Service Commission

Fon-Ex, Inc.

GTE Service Corporation
Indiana Utility Regulatory Commission
Kansas Relay Service, Incorporated
Maryland, Public Service Commission
MCI Telecommunications Corporation
Minnesota Public Utilities Commission
National Association of the Deaf
National Center for Law and the Deaf
National Exchange Carrier Association
National Telephone Cooperative Association
NYNEX
Ohio, Public Utilities Commission
OPASTCO
Oregon Independent Telephone Association
Pacific Bell and Nevada Bell
Pennsylvania Public Utility Commission
Rochester Telephone Corporation
Self Help For Hard of Hearing People, Inc.
Social Security Administration
Southern New England Telephone Company
Tennessee Public Service Corporation
Texas Public Utility Commission
Texas Telephone Association
UltraTec, Inc.
United States Telephone Association
United Telecommunications, Inc.
Utah Public Service Commission
Virginia, State Corporation Commission
Washington, State Department of Social and Health Services
Wisconsin Department of Administration

Parties Filing Replies

American Foundation for the Blind
AT&T
Bell Atlantic Telephone Companies
BellSouth Corporation
Central Telephone Company
Chillicothe Telephone Company
Connecticut, State Department of Human Resources
Connecticut, State Office of Consumer Counsel
GTE Service Corporation
Iowa Utilities Board
McCaw Cellular Communications, Inc.
MCI Telecommunications Corporation
National Association of Regulatory Utility Commissioners
National Center for Law and the Deaf
National Exchange Carrier Association
National Telephone Cooperative Association
New York Senate
New York, State Department of Public Service
New York State Telephone Association, Inc.
NYNEX
Rochester Telephone Corporation
Southern New England Telephone Company
Southwestern Bell Telephone Company
Telocator
UltraTec, Inc.
United States Telephone Association
Virginia, State Corporation Commission

APPENDIX B

Parts 0 and 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, parts 0 and 64) are amended as follows:

Part 0 - COMMISSION ORGANIZATION

1. The authority citation for part 0 is revised to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.91 is amended by adding new paragraph (m) to read as follows:

§ 0.91 Functions of the Bureau.

* * * * *

(m) Acts upon matters involving telecommunications relay services complaints and certification.

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Subpart F of part 64 is revised in its entirety to read as follows:

Subpart F - Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities

64.601 Definitions.
64.602 Jurisdiction.
64.603 Provision of services.
64.604 Mandatory minimum standards.
64.605 State certification.

64.606 Furnishing related customer premises equipment.

64.607 Provision of hearing aid compatible telephones by exchange carriers.

64.608 Enforcement of related customer premises equipment rules.

Subpart F - Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities

§ 64.601 Definitions.

(a) As used in this subpart, the following definitions apply:

(1) American Sign Language (ASL): A visual language based on hand shape, position, movement, and orientation of the hands in relation to each other and the body.

(2) ASCII: An acronym for American Standard Code for Information Interexchange which employs an eight bit code and can operate at any standard transmission baud rate including 300, 1200, 2400, and higher.

(3) Baudot: A seven bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate.

(4) Common carrier or carrier: Any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) of the Communications Act of 1934, as amended (the Act), and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b) of the Act.

(5) Communications assistant (CA): A person who transliterates conversation from text to voice and from voice to text between two end users of TRS. CA supersedes the term "TDD operator."

(6) Hearing carry over (HCO): A reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.

(7) Telecommunications relay services (TRS): Telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a text telephone or other nonvoice terminal device and an individual who does not use such a device. TRS supersedes the terms "dual party relay system," "message relay services," and "TDD Relay."

(8) Text telephone (TT): A machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. TT supersedes the term "TDD" or "telecommunications device for the deaf."

(9) Voice carry over (VCO): A reduced form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice the conversation.

§ 64.602 Jurisdiction.

Any violation of this subpart by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of the Act by a common carrier engaged in interstate communication.

§ 64.603 Provision of services.

Each common carrier providing telephone voice transmission services shall provide, not later than July 26, 1993, in compliance with the regulations prescribed herein, throughout the area in which it offers services, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with these regulations:

(a) with respect to intrastate telecommunications relay services in any state that does not have a certified program under § 64.605 and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with § 64.604; or

(b) with respect to intrastate telecommunications relay services in any state that has a certified program under § 64.605 for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under § 64.605 for such state.

§ 64.604 Mandatory minimum standards.

(a) Operational standards.

(1) Communications assistant (CA). TRS providers are responsible for requiring that CAs be sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities; and that CAs have competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette.

(2) Confidentiality and conversation content. Consistent with the obligations of common carrier operators, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call. CAs are prohibited from intentionally altering a relayed conversation and must relay all conversation verbatim unless the relay user specifically requests summarization.

(3) Types of calls. Consistent with the obligations of common carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls utilizing relay services. TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call will be placed on the carriers. Providers of TRS are permitted to decline to complete a call because credit authorization is denied. CAs shall handle emergency calls in the same manner as they handle any other TRS calls.

(b) Technical standards.

(1) ASCII and Baudot. TRS shall be capable of communicating with ASCII and Baudot format, at any speed generally in use.

(2) Speed of answer. TRS shall include adequate staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network. TRS shall, except during network failure, answer 85% of all calls within 10 seconds and no more than 30 seconds shall elapse between receipt of dialing information and the dialing of the requested number.

(3) Equal access to interexchange carriers. TRS users shall have access to their chosen interexchange carrier through the TRS, and to all other operator services, to the same extent that such access is provided to voice users.

(4) TRS facilities. TRS shall operate every day, 24 hours a day. TRS shall have adequate redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use. TRS shall transmit conversations between TT and voice callers in real time. Adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response due to loop or trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(5) Technology. No regulation set forth in this subpart is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to persons with disabilities. VCO and HCO technology are required to be standard features of TRS.

(c) Functional standards.

(1) Enforcement. Subject to § 64.603, the Commission shall resolve any complaint alleging a violation of this section within 180 days after the complaint is filed.

(2) Public access to information. Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TT numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of TRS.

(3) Rates. TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

(4) Jurisdictional separation of costs.

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service. Costs caused by intrastate TRS providers shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.605, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section.

(5) Complaints.

(i) Referral of complaint. If a complaint to the Commission alleges a violation of this subpart with respect to intrastate TRS within a state and certification of the program of such state under § 64.605 is in effect, the Commission shall refer such complaint to such state expeditiously.

(ii) Jurisdiction of Commission. After referring a complaint to a state under paragraph (i), or if a complaint is filed directly with a state, the Commission shall exercise jurisdiction over such complaint only if:

(A) final action under such state program has not been taken within:

(*1*) 180 days after the complaint is filed with such state; or

(*2*) a shorter period as prescribed by the regulations of such state; or

(B) the Commission determines that such state program is no longer qualified for certification under § 64.605.

(iii) Complaint procedures.

(A) Content. A complaint shall be in writing, addressed to the Federal Communications Commission, Common Carrier Bureau, TRS Complaints, Washington, DC 20554, or addressed to the appropriate state office, and shall contain:

(*1*) the name and address of the complainant,

(2) the name and address of the defendant against whom the complaint is made,

(3) a complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of this subpart, and

(4) the relief sought.

(B) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(C) Number of copies. An original and two copies of all pleadings shall be filed.

(D) Service.

(1) Except where a complaint is referred to a state pursuant to § 64.604(c)(5)(i), or where a complaint is filed directly with a state, the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(2) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47 of this chapter. Proof of such service shall also be made in accordance with the requirements of said section.

(E) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

(F) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matter. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

(G) Defective pleadings. Any pleading filed in a complaint proceeding that isnot in substantial conformity with the requirements of the applicable rules in this subpart may be dismissed.

§ 64.605 State certification.

(a) State documentation. Any state, through its office of the governor or other delegated executive office empowered to provide TRS, desiring to establish a state program under this section shall submit, not later than October 1, 1992, documentation to the Commission addressed to the Federal Communications Commission, Chief, Common Carrier Bureau, TRS Certification Program, Washington, DC 20554, and captioned "TRS State Certification Application." All documentation shall be submitted in narrative form, shall clearly describe the state program for implementing intrastate TRS, and the procedures and remedies for enforcing any requirements imposed by the state program. The Commission shall give public notice of states filing for certification including notification in the Federal Register.

(b) Requirements for certification. After review of state documentation, the Commission shall certify, by letter, or order, the state program if the Commission determines that the state certification documentation:

(1) establishes that the state program meets or exceeds all operational, technical, and functional minimum standards contained in § 64.604;

(2) establishes that the state program makes available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) where a state program exceeds the mandatory minimum standards contained in § 64.604, the state establishes that its program in no way conflicts with federal law.

(c) Certification period. State certification shall remain in effect for five years. One year prior to expiration of certification, a state may apply for renewal of its certification by filing documentation as prescribed by paragraphs (a) and (b) of this section.

(d) Method of funding. Except as provided in § 64.604, the Commission shall not refuse to certify a state program based solely on the method such state will implement for funding intrastate TRS, but funding mechanisms, if labeled, shall be labeled in a manner that promote national understanding of TRS and do not offend the public.

(e) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a state whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this subpart, to ensure continuity of TRS.

§ 64.606 Furnishing related customer premises equipment.

(a) Any communications common carrier may provide, under tariff, customer premises equipment (other than hearing aid compatible telephones as defined in part 68), needed by persons with hearing, speech, vision or mobility disabilities. Such equipment may be provided to persons with those disabilities or to associations or

institutions who require such equipment regularly to communicate with persons with disabilities. Examples of such equipment include, but are not limited to, artificial larynxes, bone conductor receivers and TTs.

(b) Any carrier which provides telecommunications devices for persons with hearing and/or speech disabilities, whether or not pursuant to tariff, shall respond to any inquiry concerning:

(1) the availability (including general price levels) of TTs using ASCII, Baudot, or both formats; and

(2) the compatibility of any TT with other such devices and computers.

§ 64.607 Provision of hearing aid compatible telephones by exchange carriers.

In the absence of alternative suppliers in an exchange area, an exchange carrier must provide a hearing aid compatible telephone, as defined in part 68, and provide related installation and maintenance services for such telephones on a detariffed basis to any customer with a hearing disability who requests such equipment or services.

§ 64.608 Enforcement of related customer premises equipment rules.

Enforcement of §§ 64.606 and 64.607 is delegated to those state public utility or public service commissions which adopt those sections and provide for their enforcement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DAILEY & REICH — File Nos. BR-880707UA
BRH-880707YB

For Renewal of License of
Station WDXY
Sumter, South Carolina and
Station WIBZ-FM
Wedgefield, South Carolina

CORDES STREET COMMUNICATIONS, INC. — File No. BRH-880729YC

For Renewal of License of
Station WAVF-FM
Hanahan, South Carolina

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: July 11, 1991; **Released: July 25, 1991**

By the Commission:

1. The Commission has before it for consideration: (i) a Petition to Deny filed November 1, 1988, by the National Black Media Coalition, the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), and various local NAACP branches (hereafter "NBMC/NAACP") against the above-captioned renewal applications; (ii) oppositions from the licensees; and (iii) the licensee's responses to staff letters of inquiry. NBMC/NAACP allege that the above-captioned stations violated the Commission's equal employment opportunity (EEO) rules and policies. NBMC/NAACP request that the Commission investigate the stations' employment practices and designate the renewal applications for hearing.

2. *PROCEDURAL MATTERS.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show...that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)(*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989) (*Dubuque*). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny was a declaration under penalty of perjury made by Edward Bryant, president of the North Charleston, South Carolina Branch of the NAACP, concerning WAVF-FM. We find that Mr. Bryant's declaration meets the requirements of the Commission's Rules for establishing standing for his branch and for the State Conference of Branches of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Accordingly, we find that the challenge filed by the South Carolina State Conference of Branches of the NAACP and the North Charleston Branch of the NAACP constitutes a valid petition against WAVF-FM.

4. The licensee of WDXY and WIBZ-FM asserts that because petitioners failed to file timely supporting affidavits regarding those stations, the petitioners have not established standing. Furthermore, the licensee asserts that even if the petitioners have standing, they have failed to establish a prima facie case that the licensee has failed to comply with the Commission's EEO policy.

5. On November 1, 1988, the Commission received the Petition to Deny, and on November 22, 1988, received a supporting statement under penalty of perjury concerning WDXY/WIBZ-FM from Rubye J. Johnson, president of the Sumter Branch of the NAACP, who resides in the station's listening area. As we stated in *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988)(*Florida*), we will not acquiesce to petitioners' habit of submitting late filings for nonsubstantial reasons. In as much as the NAACP submitted Ms. Johnson's statement untimely and without cause, it is insufficient to establish standing against Stations WDXY and WIBZ-FM. We note that Dr. William Gibson of Greenville, South Carolina, who is president of the South Carolina Conference of Branches of the NAACP, also filed a statement under penalty of perjury accompanying the Petition to Deny. His statement concerned all of the stations in the Petition which are located in South Carolina.[1] We note, however, that he does not reside in the listening area of WDXY or WIBZ-FM. His statement is insufficient to convert the NAACP objection into a formal petition. Accordingly, pursuant to Section 73.3584(b) of the Commission's Rules, 47 C.F.R. Section 73.3584(b), the NAACP will be considered an informal objector in its challenge against WDXY/WIBZ-FM.

6. The Petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, of the Washington, D.C. metropolitan area. Mr. Marshall does not reside in the listening areas of WDXY/WIBZ-FM or WAVF-FM. The Commission has held previously that affidavits from any person who is not a resident of the station's area or a listener of the station, do not satisfy the requirements of the Act for standing to challenge the license renewal of a station. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that the NBMC lacks standing to petition WDXY/WIBZ-FM or WAVF-FM and we will treat its petition as an informal objection.

7. *DISCUSSION.* Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities

are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

8. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the record indicates inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (*Broadcast EEO*). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

9. Petitioners' factual allegations are derived from the stations' EEO programs and annual employment reports. Our review of those documents leads us to conclude that a *prima facie* case concerning non-compliance with our EEO rule was raised as to each of the stations. *See* 47 U.S.C. Sec. 309(d)(1); *Astroline*, *supra*. However, after evaluating the three stations' EEO efforts in light of their oppositions and responses to our inquiries, we find that there remain no substantial and material questions of fact requiring a hearing. Thus, grant of each application will serve the public interest. 47 U.S.C. Sec. 309(d)(2). *Astroline*, *supra*. Accordingly, we will grant renewal but with appropriate sanctions and/or remedies. Our analysis of each licensee's EEO efforts follows.

WDXY, Sumter and WIBZ-FM, Wedgefield

10. In response to our letter of inquiry, the licensee indicated that it had 16 overall (all upper-level) full-time hiring opportunities from May 19, 1984 through May 19, 1988. The stations received minority referrals from the *Sumter Daily Item* (36 minority referrals out of 94 total referrals from November 1987 through November 1988 for two openings) and from the "National Talent" employment agency (one referral). The licensee also indicates that an unknown number of referrals came from Sumter Area Technical College, a station employee, and local schools in which the stations set up broadcast clubs that had Black members. Other sources used that did not produce referrals include People Resources, Inc. (a Black-owned employment agency), Morris College (an historically Black college), the *Gavin Report*, on-air announcements, letters sent to other South Carolina radio stations, *Radio and Records*, and the University of South Carolina at both the Sumter and Columbia campuses. The licensee indicated that it has no information on interviewees and stated that the information on applicants is probably incomplete because, until November 1988, it assumed that the law prohibited listing race on an employment application. The licensee reports that there has been low turnover at the stations and the recollection of the employees is that minority applicant pools have been large for the few openings that have arisen. Four of the 16 overall full-time employees hired were minorities -- a Black female public service director/copywriter, a Black female announcer, a Black male announcer, and an Hispanic female announcer. All were upper-level employees.

11. NBMC/NAACP assert that the station's EEO efforts throughout the license term failed to include the use of minority recruitment sources. They indicate that the licensee employs too few minorities considering the racial composition of the local workforce.[2]

12. In opposition, the licensee asserts that its original Broadcast Equal Employment Opportunity Program Report (FCC Form 396) concerning minority recruitment sources failed to list all the sources actually contacted and it filed an amended EEO Program Report dated December 5, 1988, to more accurately reflect the stations' actual, more extensive, efforts. The licensee asserts that the *Sumter Daily Item* is the only newspaper in town and is the stations' main recruitment source. The licensee also reports that half the members of the broadcast clubs the licensee sponsors in local schools are Black and a number of them have worked part-time at the stations. It states that it has a hard time recruiting or retaining Blacks in a market where the stations pay less than other jobs and there is a Black-format 100,000-Watt station that offers higher salaries. Further, the licensee reports that many of the Black employees who have worked full or part-time at the station have left to obtain more lucrative jobs in bigger markets. The licensee claims to use all of the minority sources it knows of locally for its recruitment efforts. It also asserts that it has a viable EEO program which it uses conscientiously and which has resulted in numerous Black applicants for the few openings available. Moreover, the licensee submitted 14 letters from businesses and individuals in various parts of the Sumter community testifying to the stations' service to the community and/or EEO efforts. Lastly, we note that the Annual Employment Reports filed for both stations combined showed a total of only eight full-time employees from 1984-1985, 12 such employees for 1986-1988, nine employees in 1989, and a return to eight employees in 1990.

13. In view of the foregoing, we find no substantial and material question of fact to warrant a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. While there appears to be a lack of complete record-keeping regarding recruitment and interviewees, and a lack of information indicating active self-assessment, the licensee engaged in some meaningful recruitment and hiring of minorities for its relatively small staff. Considering the stations' small staff of eight to nine full-time employees for most of the license term, the licensee's efforts at minority recruitment which have resulted in referrals and upper-level hires, and the licensee's recognition of the need to keep better records to help it engage in appropriate self-assessment of its EEO efforts, no sanctions or remedies appear warranted. However, we caution the stations to improve their efforts with respect to record-keeping and self-assessment.

WAVF-FM, Hanahan

14. In response to our letter of inquiry, the licensee indicated that it had 32 overall and 28 upper-level full-time hiring opportunities from July 1, 1985[3] until July 1, 1988. Although the licensee states that it asked some minorities to apply to work at the station in the summer of 1987, the station has no record of having received minority referrals from any sources until two minorities

were referred by WAVF-FM employees between August 1987 and September 1988. The licensee recruited by personal contacts and did not list openings in publications until July 1988, when the licensee began listing openings in *Radio & Records*, the *News-Courier* (Charleston's general circulation newspaper), two minority-oriented newspapers -- *The Chronicle* and the *Coastal Times*, -- and at Trident Technical College. The information the licensee submitted indicates that it does not know if minority candidates were interviewed prior to 1988. Moreover, for the period March 1985 through June 1987, the licensee had no records regarding the number, gender, race, or recruitment source of any interviewees other than those hired. The station hired its first minority full-time employee, a Black female copywriter (professional), on September 12, 1988, after the deadline for filing its renewal application.

15. NBMC/NAACP assert that the station's EEO efforts throughout the license term were inadequate. While not disputing the station owner's asserted support for minority causes, NBMC/NAACP state that such support is irrelevant in light of the station's record of hiring no minorities during its license term when it is located in a market that is 30.0% minority (28.1% Black).[4]

16. In opposition, the licensee asserts that it now strictly adheres to an adequate EEO program which includes contact not only with minority newspapers, but also personal contacts with schools and minority leaders in the area. The licensee admits that its records and hiring practices prior to July 1987 were "haphazard" but states that it has solved the problems of the past. The licensee denies that it has ever discriminated and points out that the station owner has been active in minority business enterprise and training programs in his community and that WAVF-FM employed two minority part-time employees in early 1985.

17. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. The licensee has recruited and hired Blacks. However, it is apparent that the station's EEO efforts during the license term were deficient. The record indicates that the licensee failed to maintain adequate records of its recruiting practices to know the full extent to which minority referrals were received, if any, and to know if any minorities were in applicant pools. The absence of such documentation means that the licensee was not in a position to monitor or self-assess the station's EEO performance in any substantial or meaningful manner. The record also indicates that the station failed to engage in sufficient efforts to recruit and consider minorities for the 32 full-time vacancies that occurred between March 1985 and December 1, 1988. The licensee acknowledges that its recruiting and hiring practices were haphazard at least for the first two years. Moreover, the record shows that almost all vacancies at the station until the last few months of the license term were filled without consulting minority recruitment sources or even public sources of any kind. The licensee contacted minority sources for the first time five months prior to the expiration of the station's license and hired its first minority full-time employee after filing for renewal. Although the licensee did engage in some efforts, the overall insufficiency of the licensee's efforts, coupled with its obvious lack of results, warrants the imposition of significant sanctions and remedies.[5]

18. The record of WAVF-FM is only slightly better than the record of WSBY/WQHQ-FM of Salisbury and Ocean City, Maryland, respectively. In that case, the stations obtained two minority referrals from the time the licensee acquired the stations through the end of the license term, 1986-1988, and infrequently used only two minority recruitment sources. Their self-assessment was inadequate and their record demonstrated a repeated failure to comply with the Commission's Rules. Also, the stations lost the two minorities they had when the Woolfson Broadcasting Corporation acquired the stations and hired no minorities out of 33 hiring opportunities despite a labor force that was 19.1% Black. Accordingly, the licensee received a renewal for less than a full term, a $15,000 forfeiture, and reporting conditions. *Application of Woolfson Broadcasting Corporation for Renewal of License of Stations WSBY/WQHQ-FM, Salisbury and Ocean City, MD*, 4 FCC Rcd 6160 (1989) (*WSBY/WQHQ*). Unlike WSBY/WQHQ-FM, WAVF-FM hired a minority employee, albeit two and one-half months prior to the close of its license term, installing her in an upper-level position. In addition, WAVF-FM did not lose minority employees as did WSBY/WQHQ. The case of WAVF-FM is also similar to, but worse than, that of WKZQ/WKZQ-FM of Myrtle Beach, South Carolina. *South Carolina, supra*, (WKZQ/WKZQ-FM). In that case, the stations used recruitment sources, but only for 12 (30.8%) of their 39 openings during the license term, and obtained minority referrals for only three applicant pools. The stations employed no Blacks in upper-level positions until the end of the license term in an area in which the workforce was 17.9% Black. Unlike WAVF-FM, however, they employed two Blacks in lower-level positions throughout their 1981-1988 license term, and employed one Hispanic in an upper-level position in 1988. WKZQ/WKZQ-FM received renewal for less than a full term, a $10,000 forfeiture, and reporting conditions. In the case of WAVF-FM, the licensee failed to comply with Section 73.2080 (c)(2), (c)(3), and (c)(5) of the Commission's Rules.

19. Accordingly, we will grant renewal for less than a full term and require the submission of EEO reports. Also, for the repeated failures to comply with the Commission's affirmative action provisions as described above, we will impose a forfeiture of $13,000. Finally, we will require submission of a new EEO program which details those steps the licensee proposes to take when job vacancies occur and establishes procedures to review the effectiveness of those efforts. *See Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia*, 95 FCC 2d 1, 8-9 (1984).

20. Accordingly, IT IS ORDERED, that the petition to deny filed by the South Carolina State Conference of Branches of the NAACP and the North Charleston, South Carolina Branch of the NAACP regarding Station WAVF-FM and the informal objection filed by the named South Carolina branches of the NAACP regarding Stations WDXY/WIBZ-FM ARE DENIED.

21. IT IS FURTHER ORDERED that the informal objection filed by the National Black Media Coalition IS DENIED.

22. IT IS FURTHER ORDERED, that the license renewal application for Stations WDXY/WIBZ-FM IS GRANTED.

23. IT IS FURTHER ORDERED, that the license renewal application for Station WAVF-FM IS GRANTED FOR A SHORT TERM ending August 1, 1993 subject to the EEO conditions specified herein.

24. IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, this document constitutes a Notice of Apparent Liability for forfeiture of $13,000 for the licensee of WAVF-FM.[6]

25. IT IS FURTHER ORDERED, that the licensee of Station WAVF-FM submit within 30 days of the release of this Memorandum Opinion and Order and Notice of Apparent Liability an original and one copy of an amended EEO program, specifying the steps it proposes to take to increase its efforts to recruit qualified minorities and specifying the procedures to be established to review the effectiveness of its EEO efforts.

26. IT IS FURTHER ORDERED, that the licensee of Station WAVF-FM file an original and one copy of the following information on May 1, 1991, August 1, 1992, and August 1, 1993:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[7]

(b) a list of employees as of the May 1, 1991 payroll period for the report and as of the August 1, 1992 and August 1, 1993 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

27. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee as well as counsel for the NBMC and the NAACP.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Petition to Deny was filed against 35 stations, 20 of which are located in South Carolina, and 15 of which are located in North Carolina. This Order addresses three South Carolina stations. The Commission will include two of the other stations in the Petition in future dispositions; the Commission already has addressed the others in previous Orders or letters.

[2] The Sumter, South Carolina MSA is 44.5% female and 18.1% minority (17.1% Black). The stations' Annual Employment Reports (FCC Form 395-B) indicate that they employed one Black in an upper-level position out of 12 overall employees in 1988, 1987, and 1986 (11.1%); and no minorities out of eight overall employees in 1985. Neither of the stations were challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward both women and minorities. We found each station's record of recruiting women sufficient.

[3] The station went on the air in March 1985.

[4] Hanahan is located in the Charleston MSA, which is 44.5% female and 30% minority, with Blacks comprising 28.1% of the total workforce. From 1986 through 1988, the station's workforce varied between 14 and 21 employees, with the upper-level workforce varying between 12 and 14 employees. The station was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the station's EEO efforts toward both women and minorities. We found the record of recruiting women sufficient.

[5] It is encouraging that the licensee engaged in some minority recruitment, hired a minority for an upper-level position and revised its EEO program to include minority sources. However, because the licensee's records and self-assessment were seriously inadequate for almost the entire license term and the minority recruitment and hiring did not occur until the last months of the term, sanctions are warranted.

[6] In regard to the forfeiture, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in an attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[7] Such a list might start: 1) News Director; Officials and Managers; Full-time. 3 Applicants: 1 White female, A.W.R.T.; 1 Black male, Urban League; 1 Black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., Urban League, and NAACP. Selected - Black male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-190

In re Applications of

JUDITH O. and LARRY R. ORKUS (hereafter "Orkus")	File No. BPH-900510MF
SAGE BROADCASTING CORPORATION of OHIO (hereafter "Sage")	File No. BPH-900510MG
PAC BROADCASTING PARTNERSHIP (hereafter "PAC")	File No. BPH-900510MJ
PORT MATILDA FM LIMITED PARTNERSHIP (hereafter "PMFMLP")	File No. BPH-900510MO
PORT MATILDA BROADCASTING LIMITED (hereafter "PMBL")	File No. BPH-900510MR
PHYLLIS J. THALER (hereafter "Thaler")	File No. BPH-900509MJ (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
in Port Matilda, Pennsylvania
Channel 300A (107.9 MHz)

HEARING DESGNATION ORDER

Adopted: June 19, 1991; Released: August 5, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Thaler.* FM authorizations for new stations located within 320 kilometers of the Canadian border are subject to a Bilateral Agreement between the U.S. and Canada. The U.S.-Canadian Agreement, *inter alia*, imposes strict limitations on the power, height, and proximity of domestic FM stations near the Canadian border areas. This agreement restricts U.S. Class A FM facilities to a maximum of 3 kW ERP at 100 m HAAT within the Canadian border zone, unless the Table of Allotments in the applicable agreement has already been changed to a higher class. Consistent with the "hard look" processing procedures for new FM applications adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), it is the applicant's responsibility to review his application to ensure its acceptability. *See, e.g., R.A.D. Broadcasting Corporation*, 4 FCC Rcd 4772, 4773 (1989), *appeal dismissed*, No. 89-1413 (D.C. Cir. Feb. 27, 1990). The "hard look" procedures state that antenna height and power are evaluated in the course of an acceptability study and that those parameters may be affected by international agreements. Moreover, the instructions to FCC Form 301 admonish applicants to familiarize themselves with the Commission's rules, which make specific reference to the U.S.-Canadian Agreement. Applications that fail to comply with international broadcasting agreements are unacceptable for filing and are thus summarily dismissed. *See Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990); *cf. Kerrville Radio*, 2 FCC Rcd 3441, 3442 (1987) (Commission's rules for FM radio stations place responsibility for compliance with U.S.-Mexican Agreement squarely on the applicant); *1010 Broadcasting, Inc.*, 59 RR 2d 1124, 1125-26 (1986) (same).

3. With regard to the Thaler application, while her technical proposal complies with the domestic Class A limits of 6 kW at 100 m, it nevertheless exceeds the current limit of 3 kW ERP for Class A stations located within 320 kilometers of the Canadian border, as imposed by the existing Canadian/U.S. treaty. Accordingly, the Thaler application will be dismissed as inadvertently accepted for filing.

4. *Orkus.* In response to Section II, Item 11(a) of Form 301, Orkus stated that it is not in compliance with 47 U.S.C. § 310(b) relating to interests of aliens and foreign governments in its application. Additionally, Orkus inexplicably failed to provide an exhibit as to the particulars of its response as requested therein. However, the Orkus application also indicates in Section II, Item 6(2) that both of its principals are U.S. citizens, which implies that its response to Item 11(a) may stem from an inadvertent misreading of the question. Accordingly, to resolve this matter, an appropriate issue will be specified below.

5. *Sage.* Sage's proposed transmitter site is short-spaced by 1.4 km to the licensed transmitter site of WBGE(FM) Williamsport, Pennsylvania.[1] In order to be in compliance with the Commission's regulations, the applicant has requested processing under the contour overlap provisions of 47 CFR § 73.215.[2]

6. Using this rule, Sage claims that no prohibited overlap will exist. However, the staff's analysis of the submitted proposal using the provisions of § 73.215 indicates that up to 1.6 km of overlap between the proposed 60 dBu protected contour and the 40 dBu interfering contour of WGBE(FM) will exist between the azimuths of 46

[1] 47 C.F.R. § 73.213(c)(1) requires that a separation of 105 km be maintained between this proposal and WBGE(FM), whereas the actual separation is 103.6 km.

[2] We note that because the instant proposed facilities are only 103.6 km from WGBE, whereas the distance required by 47 C.F.R. § 73.207 is 115 km, Sage's proposal exceeds the 8 km short-spacing temporary restriction set forth in 47 C.F.R. § 73.215(e) Note. However, Class A stations, such as Sage's proposed facility, are exempted from that restriction. *Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375, 6382 (1989), *recon. denied in pertinent part, Memorandum Opinion and Order*, FCC 91-128, released May 30, 1991, at para. 22.

degrees clockwise to 48 degrees, resulting in interference received by the instant application.[3] Consequently, this application is in violation of 47 CFR § 73.215.

7. We acknowledge that 47 C.F.R. § 73.215 may be confusing as to how to interpret the correct ERP/HAAT combination for determining the field strength contours, and, therefore, applicants reading this rule may fail to reach the proper conclusion. We also note that in another context the District of Columbia Circuit Court of Appeals has stated:

> [T]he *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements: "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." [*Radio Athens, Inc. (WATH) v. FCC*, 401 F. 2d 298, 404 (D.C. Cir. 1968)]. The less forgiving the FCC's acceptability standard, the more precise its requirements must be. (Footnote omitted.)

Rochelle C. Salzer v. FCC, 778 F2d 869, 875 (D.C. Cir. 1985). *See also Bamford v. FCC*, 535 F. 2d 78 (D.C. Cir. 1976). Accordingly, in view of the foregoing, we conclude that the defect noted above does not warrant return of the application. However, Sage will be required to submit a curative amendment to the presiding Administrative Law Judge after this Order is released. If the amendment fails to cure the defect, the amendment along with the original application will be dismissed.

8. Secondly, Sage has not completed Section II, Item 6 of FCC Form 301 correctly. That item requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sage's application gives only a city and state as the home address for each of its principals. Accordingly, Sage must submit as amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

9. Thirdly, Sage petitioned for leave to amend its application on October 4, 1990. The accompanying amendment was filed after September 4, 1990, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

10. Finally, attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Sage have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Sage would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. *PAC*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although PAC has filed such statement, it appears to be deficient. PAC failed to list any minority recruitment sources. Accordingly, PAC will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

12. Data submitted by the applicants indicate there would be a significant difference in the areas and the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether Orkus is in violation of 47 U.S.C. § 310(b), and, if so, the effect thereof on its basic qualifications to be a Commission licensee.
>
> 2. To determine whether there is a reasonable possibility that the tower height and location proposed by Sage would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the application filed by Thaler IS HEREBY DISMISSED as inadvertently accepted for filing.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Sage shall submit the amendment required in paragraph 7 hereinabove to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That Sage shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

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[3] Sage's application posits that no overlap will exist as a result of its erroneous use of assumed facilities for WGBE of 0.375 kW ERP at 394 meters HAAT (which is equivalent to coverage obtained by 6.0 kW ERP at 100 m HAAT). Instead, Sage should have assumed that WGBE was operating with 6.0 kW ERP at 100 m HAAT, as is required by 47 C.F.R. § 73.215(b)(2)(ii). This error causes the distance to the interfering contour of WGBE to be understated.

19. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Sage IS GRANTED, and the corresponding amendment IS ACCEPTED to the extend indicated herein.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PAC shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

21. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-198

In re Applications of

EDWARD F. and PAMELA J. LEVINE (hereafter "Levine")	File No. BPH-900514MM
VIRGINIA CALDWELL KOZLOWSKI (hereafter "Kozlowski")	File No. BPH-900514MN
MAURICE F. A. BATTISTI (hereafter "Battisti")	File No. BPH-900515ME
LOIS W. O'CONNOR (hereafter "O'Connor")	File No. BPH-900515MG
GREAT SCOTT BROADCASTING	File No. BPH-900516ML
JB COMMUNICATIONS (hereafter "JB")	File No. BPH-900516MO
ALLSWELL BROADCASTING, INC. (hereafter "Allswell")	File No. BPH-900516MP
MARY C. MURRAY (hereafter "Murray")	File No. BPH-900516MT
CAROL A. MORGAN (hereafter "Morgan")	File No. BPH-900516MU
ENDWELL FM ASSOCIATES (hereafter "Endwell FM")	File No. BPH-900516MQ (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
on Channel 298A
in Endwell, New York

HEARING DESIGNATION ORDER

Adopted: June 24, 1991; Released: August 5, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Endwell FM.* Section II, Item 11(a) of FCC Form 301 (June 1989) asks whether the applicant is "in violation of the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign government?" Endwell FM has not answered this question. In addition, on October 17, 1990, Battisti filed a petition to dismiss Endwell FM's application as not acceptable for tender. On October 26, 1990, Endwell FM filed an opposition which essentially argued that the application is sufficient for tender because the Commission is able to determine the applicant's compliance with the alien ownership and control provisions of the Act, "confidently and reliably, drawing on the application as a whole," citing *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (May 13, 1985). The opposition contends that there are three separate indications of Endwell FM's complete compliance in this respect: (1) the citizenship of its sole principal and individual applicant, Grover H. Hubbell, is identified elsewhere in the application as "USA," (2) Mr. Hubbell is identified as having filed applications for two other construction permits, and (3) Mr. Hubbell stated that he had previously been a broadcast licensee. Battisti's reply states that it cannot be inferred that Mr. Hubbell is in compliance with § 310 of the Act "which also relates to whether the applicant is a representative of a foreign government."

3. In Appendix D to the *Report and Order* in MM Docket 84-750, *supra*, the Commission stated that failure to respond to the question by which certification of compliance with 47 U.S.C. § 310(b) is invited renders the application so fundamentally defective that further processing is unwarranted. Since the application submitted by Endwell FM does not contain sufficient information to ensure that de facto control of the applicant is not held by aliens, we conclude that the Endwell FM application was inadvertently accepted for tender and for filing and will be dismissed herein. *See Lauderdale-McKeeham Christian Broadcasting Corp.*, 4 FCC Rcd 8095 (1989). Given this action, Battisti's petition to dismiss will be granted to the extent indicated.

4. *Tower Coordinate Discrepancy.* Allswell proposes to mount its antenna on an existing tower structure. However, the coordinates listed in Section V-B of FCC Form 301 (June 1989) and those contained in the Commission's records are inconsistent with those derived from the 7.5 minute map in the application. Specifically, the Federal Aviation Administration and our Antenna Survey Branch list the coordinates of the existing tower as 42° 06' 53" NL and 75° 51'*16"* WL. However, the coordinates as derived from the 7.5 minute map are 42° 06' 53" NL and 75° 51' *19"*. Since this is an existing tower on file with the Commission, the discrepancy is neither a tenderability nor an acceptability defect and therefore may be resolved with an amendment.

5. *Site Elevation and Tower Height Discrepancy.* The tower data submitted in Allswell's application is inconsistent with that derived from their 7.5 minute map. The site elevation as given in Section V-B, Item 7(a)(1) is 1433 feet (437 meters) while the value as read from the 7.5 minute map is 1390 feet (424 meters). In addition, in Section V-B, Item 7(b) Allswell lists the tower height as 150 meters above ground level and 587 meters above mean sea level. Our Antenna Survey Branch and the Federal Aviation Administration list the current height of the existing tower as 123.4 meters above ground level and 562.4 meters above mean sea level. Accordingly, an air hazard

issue will be specified and Allswell must submit a corrective amendment to cure the tower coordinate, site elevation and tower height discrepancies with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Cross-interest.* The president, vice president, treasurer and director of applicant Allswell is Walter G. Adams. He is also the holder of 100% of the voting stock of Allswell. His wife, Judith M. Adams, is secretary and director of Allswell. Dr. Paul T. Titus is the holder of 100% of the non-voting stock of the applicant. Dr. Titus is also president, director and 97% shareholder of Titus Broadcasting Systems, Inc., the licensee of station WINR(AM), Binghamton, New York. Mr. Adams is presently the general manager of WINR(AM), and Mrs. Adams is an account executive at WINR(AM). They have all indicated their intent to terminate their relationships with WINR(AM) in the event of grant of the referenced application. This employment may represent a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy,* 4 FCC Rcd 2208 (1988). Accordingly, in the event of grant of Allswell's application, Mr. Adams, Mrs. Adams and Dr. Titus will be required to sever all connections with WINR(AM) prior to the commencement of program test authority.

7. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Levine and Allswell have filed such statements, they are deficient. Levine has not supplied the name and/or title of the official who will be responsible for implementing the station's EEO program in response to Section II and Allswell has not listed a women's organization in response to Section IV. Accordingly, Levine and Allswell will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

8. *Late-Filed Amendments.* Kozlowski and JB petitioned for leave to amend their applications on December 21, 1990 and November 13, 1990 respectively. The accompanying amendments were filed after October 19, 1990, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. *Other Matters.* Six of the captioned applicants propose to locate their transmitting antennas on existing towers, and the remaining applicants propose new towers. Our engineering study indicates that eight of the nine surviving applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Levine, Kozlowski, Battisti, O'Connor, JB, Allswell, Murray and Morgan failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Levine, Kozlowski, Battisti, O'Connor, JB, Allswell, Murray and Morgan will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

10. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Allswell would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Levine, Kozlowski, Battisti, O'Connor, JB, Allswell, Murray and Morgan in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 3 hereinabove, the application of Endwell FM IS HEREBY DISMISSED.

14. IT IS FURTHER ORDERED, That the petition to dismiss filed by Battisti IS GRANTED to the extent indicated.

15. IT IS FURTHER ORDERED, That Allswell shall submit corrective amendments in accordance with paragraphs 4 and 5 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in the event of grant of Allswell's application, Walter G. Adams, Judith M. Adams and Dr. Paul T. Titus will be ordered to sever all connections with station WINR(AM), Binghamton, New York, prior to commencement of program test authority.

18. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Levine and Allswell shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Kozlowski and JB ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated herein.

20. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Levine, Kozlowski, Battisti, O'Connor, JB, Allswell, Murray and Morgan shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

21. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

ORDER DENYING EXTENSION OF TIME

Adopted: July 24, 1991; Released: August 5, 1991

By the Chief, Mass Media Bureau:

1. On July 23, 1991, KCLE Radio requested an extension of time for filing comments in response to the *Notice of Proposed Rule Making* in MM Docket No. 91-140, 6 FCC Rcd 3275 (1991) (*Notice*). Comments are currently due on August 5, 1991. Marti requests that the comment date be extended to September 5, 1991.

2. KCLE submits that it only recently become aware of the scope of MM Docket No. 91-140, and that very complex issues are involved. KCLE contends that it needs more time to prepare comments in this proceeding because it will be putting two radio stations back on the air in the next 45 days, and notes that the proposed changes affect the "link up" of several radio stations it has recently purchased. A summary of the *Notice* was published in the Federal Register on June 7, 1991, and states with specificity the proposals advanced and the information sought by the Commission. *See* 56 Fed. Reg. 26,365 (1991). We believe that the present comment period provides sufficient time for interested parties to participate in this proceeding. We note that we recently denied similar requests submitted by Marti Electronics, Inc. and by the Media Access Project. *See Order Denying Extension of Time* in MM Docket No. 91-140, DA 91-919 (released July 22, 1991); *Order Denying Extension of Time* in MM Docket No. 91-140, DA 91-899 (released July 17, 1991).

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. KCLE has not set forth reasons sufficiently compelling to justify extension of the comment period designated for this proceeding.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by KCLE Radio IS DENIED.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.204(b), 0.283 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.204(b), 0.283, 1.46.

6. For further information concerning this proceeding, contact Jane Hinckley, Policy and Rules Division, Mass Media Bureau ((202) 632-7792).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-150

In re Applications of

FRANK DIGESU, SR.	File No. BPH-880126ME
VIRGINIA GRIFFITH	File No. BPH-880127MN
LINDA L. ALT	File No. BPH-880128MO
KPI COMMUNICATIONS, INC.	File No. BPH-880128MW

For Construction Permit for a
New FM Station on Channel 231A
in Meridianville, Alabama

Appearances

Spencer W. Weisbroth, Esq. and *Donald E. Martin*, Esq. on behalf of Frank Digesu, Sr.; *Harry Martin*, Esq., on behalf of Virginia Griffith; *Jonathan W. Emord*, Esq., on behalf of Linda L. Alt; *Daniel F. Van Horn*, Esq. and *Susan A. Marshall*, Esq., on behalf of KPI Communications, Inc.; and *Gary P. Schonman*, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: July 30, 1991; Released: August 5, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Frank Digesu, Sr. ("Digesu"), Virginia Griffith ("Griffith"), Linda L. Alt ("Alt") and KPI Communications, Inc. ("KPI") for a construction permit for a new FM station to operate on Channel 231A in Meridianville, Alabama. On April 17, 1990, the Commission released a *Hearing Designation Order* ("*HDO*") designating the applications[1] for hearing on the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.[2]

2. A prehearing conference was held in Washington, D.C. on June 27, 1990. Evidentiary hearings were held in Washington, D.C. on December 10 and 11, 1990. On December 11, 1990, the record was closed. *See Order*, FCC 90M-3947, released December 13, 1990.

FINDINGS OF FACT

Frank Digesu, Sr.

3. Frank Digesu, Sr. is a sole proprietor (Digesu Exh. 1, p. 1).

4. *Integration*. Digesu proposes to be integrated on a full-time basis (a minimum of 40 hours per week) as the general manager of his Meridianville FM station. As such, he would be responsible for hiring and supervising all of the department heads and key employees. He also will be responsible for the development and determination of all station policies (Digesu Exh. 1 pp. 1-2).

5. Digesu currently owns and operates South Parkway Motors, a used car dealership. If his application is granted, he will fully divest himself of all interest in South Parkway Motors, and will discontinue any involvement with the dealership. He also will withdraw from all other employment or activities which would interfere with his commitment to work full time at his proposed station (*Id.*).

6. *Local Residence*. Digesu has lived within the 1 mV/m contour of his proposed Meridianville station for approximately 20 of the last 31 years. He first moved into the service area in August 1959 but moved out in May 1960. He returned in August 1965, left again in September 1980, returned again in June 1986 and since that date has lived at the same address in Huntsville, Alabama. He intends to remain at this address whether or not his application is granted (*Id.*, p. 2). Digesu makes no claim of past residence in Meridianville.

7. *Broadcast Experience*. Digesu does not claim credit for any past broadcast experience.

8. *Civic Activities*. Digesu served as a volunteer coach with the YMCA in Huntsville from 1965 until 1980. Each year, he coached either baseball or football, and sometimes both (*Id.*, p. 3). The majority of the time that he was a coach at the YMCA, his children were participants on the teams he coached (Tr. 22).

9. Digesu worked with the Parent Teachers Association ("PTA") and Athletic Booster Club at the Whitesburg Middle School in Huntsville from 1968 until 1970, and at the Grissom High School in Huntsville from 1970 until 1974. He served variously as the President, Vice President and Treasurer of one or both of these organizations (Digesu Exh. 1, p. 3). His work with these school organizations corresponded with the attendance of his children at the schools except for one or two years (Tr. 24-25).

10. Digesu has been a member of the Holy Spirit Catholic Church in Huntsville, Alabama from 1965 until 1980, and 1986 to the present. Each year he has been member, he has participated in the Church's year long fund raising activities, the purpose of which is to purchase holiday food and Christmas toys for the disadvantaged members of the community (Digesu Exh. 1, p. 3). His work consisted of meetings six-to-eight times a year in various functions to generate funds (Tr. 26). He spends

20-to-30 hours during the year collecting funds. At Christmas time it takes another 10-to-20 hours to put the activity together and distribute toys and food (*Id.*).

11. *Diversification*. Digesu has no ownership interest in any other medium of mass communication (Digesu Exh. 1, p. 4).

12. *Auxiliary Power*. Digesu will install facilities for auxiliary power at both the transmitter and the studio locations of his proposed station (Digesu Exh. 1., p. 4).

Virginia Griffith

13. Mrs. Griffith is a sole proprietor (Griffith Exh. 1, p. 1).

14. *Diversification*. Ms. Griffith is present Chief Executive Officer of Station WTAK(FM), Huntsville, Alabama (Griffith Exh. 1, p. 4). Her husband, R. Parker Griffith, is President, Director and the sole shareholder of Gant Broadcasting, Inc., the licensee of Station WTAK (*Id.*). Mrs. Griffith has pledged to resign from her position at Station WTAK should she be awarded the Meridianville construction permit (Griffith Exh. 1, p. 4, and Griffith's January 27, 1988, Meridianville application). Mrs. Griffith's husband has pledged to divest his interest in WTAK should Griffith's Meridianville application be granted (*Id.*).

15. On August 7, 1990, an application was filed with the FCC proposing the assignment of license for Station WKQD-FM Tullahoma, Tennessee to Camellia Broadcasting, Inc. ("Camellia") (Griffith Exh. 1, p. 4). Mrs. Griffith is the President, Director and one-third owner of Camellia and her husband is Vice President, Director and a one-third owner. Mrs. Griffith and her husband have committed to divest their respective interests in Station WKQD-FM should their application for Meridianville be granted (*Id.*).

16. Neither Mrs. Griffith nor her husband has an interest in or connection with any other media of mass communications (*Id.*).

17. *Integration*. Griffith proposes 100% ownership integration based on her proposal to work a minimum of 40 hours a week as general manager of the Meridianville station (Griffith Exh. 1, p. 1). She proposes to supervise all aspects of station operations, including financing, programming, personnel, public relations, promotion and operations, including financing, programming, personnel, public relations, promotion and operations. Griffith proposes to terminate all present work commitments at Station WTAK(AM) in order to accommodate her integration pledge (*Id.*).

18. Before her marriage to Mr. Griffith, Mrs. Griffith began working for Gant Broadcasting (WTAK-AM) as a part-time minimum wage employee (Tr. 37). She held that position from 1983 to 1985 (Tr. 36-38). She did typing work, filing, billing, bookkeeping, and she helped prepare public service announcements (Tr. 37). In 1985, Mrs. Griffith was promoted to the full-time position of Office Manager. She served in that position until 1986 (Tr. 39-40). In 1986, she married R. Parker Griffith (Tr. 38). After she married, Mrs. Griffith was promoted by her husband to the full-time position of General Manager at the station (Tr. 38-39; 40-41). In 1988, she was again promoted by her husband to the position of Chief Executive Officer of Gant Broadcasting, Inc., a position she still holds (Tr. 41).

19. Originally Gant Broadcasting applied to have Channel 231A allotted to Meridianville, Alabama (Tr. 42). Mark Bond, an engineer at WTAK, first informed Mrs. Griffith of the availability of Channel 231A (Tr. 43). Mrs. Griffith had discussions with her husband about Channel 231A's availability (Tr. 43).

20. Gant was to be the applicant for the channel (Tr. 44). Mark Bond put Mrs. Griffith in contact with Gene Sisk, the engineer for the applicant, who performed a frequency search for Gant (Tr. 44). Gene Sisk was the consulting engineer for Gant at that time (Tr. 44). Gant paid for the frequency search.

21. Several months prior to the January 27, 1988 filing deadline, Sisk put together a Notice of Proposed Construction or Alteration for the applicant which was to be filed with the FAA (Tr. 45). In a letter on WTAK stationery, dated June 21, 1987, Mrs. Griffith asked Sisk to change the name on the notice from Gant Broadcasting to Virginia K. Griffith (Tr. 48, 50; Alt Exh. 5). In another letter on WTAK stationery, dated June 29, 1987, and addressed to Mrs. Griffith's counsel, she reiterated that the consulting engineer would replace the name of Gant with her own name (Tr. 51; Alt Exh. 6).

22. R. Parker Griffith has been in broadcasting for eight or nine years (Tr. 55). He has substantial experience in broadcast ownership. However, despite this experience, Mrs. Griffith says that she will not seek her husband's advice on any matters pertaining to the operation of the station if she is awarded a construction permit (Tr. 56). Nevertheless, Mrs. Griffith admits that she will rely, at least in part, on the advice of WTAK's current General Manager, Paul Buxton, in her operation of the proposed station (Tr. 57). Mrs. Griffith may hire Paul Buxton to be General Sales Manager at her proposed station (Tr. 58).

23. Mrs. Griffith and Mr. Griffith live together in the same residence. They see each other in the mornings and evenings. They share breakfast together and discuss the business of WTAK on occasions (Tr. 72).

24. Mrs. Griffith obtained her bank letter of reasonable assurance from the Colonial Bank (Tr. 73). Mr. Griffith has a bank account at Colonial Bank. It is his primary bank (Tr. 74). Although Mrs. Griffith admits that her husband knew that she needed a bank letter, she states that she did not discuss the matter of a bank letter with him (Tr. 77). However, the bank letter, in its second paragraph, specifically provides that it is a condition precedent to the provision of a loan that R. Parker Griffith provide his personal guarantee (Tr. 78).

25. Under cross-examination Mrs. Griffith admitted that she did indeed talk to her husband about the bank letter, but stated that the conversation was limited to the need for Mr. Griffith to provide his personal guarantee (Tr. 75-79).

26. *Broadcast Experience*. Griffith's broadcast experience consists of working at Station WTAK(AM), Huntsville, Alabama in the following capacities: full-time Employee/Office Manager (1984-86), full-time General Manager (1986-1988) and part-time C.E.O. (1988-present) (Griffith Exh. 1, p. 1).

27. *Local Residence*. Ms. Griffith currently resides at 416 McClung Avenue, Huntsville, Alabama. This address is within the service area of the proposed station. She has lived at this address since 1986. Previously, Griffith lived at 507 Franklin Street, Huntsville, Alabama, which is

within the service area of the proposed station. She lived at this address between 1976 and 1986 (Griffith Exh. 1, p. 1).

28. Ms. Griffith is a white female (Griffith Exh. 1, p. 3).

29. *Civil Activities.* Ms. Griffith has participated in the following civic activities within the service area of her proposed station:

1989 - Present	District Advisory Committee for City Council, Huntsville.
1989 - Present	Member, Huntsville Chamber of Commerce's Good Government Committee.
1989 - Present	Co-Chairman, Huntsville Chamber of Commerce Transportation Committee.
1989 - Present	Huntsville-Madison County Public Library Board of Directors.
1989 - Present	Huntsville-Madison County United Way Committee for Community Problem Solving: 1. Transportation Initiative Liaison 2. Task Force to design guidelines for community assistance.
1989	Huntsville-Madison County United Way Committee for Management Review.
1989 (6 Months)	Mayor's appointee to "Vision 2000 Task Force" to study transportation for the city of Huntsville.
1988 (Aug.)	Chairman, Huntsville-Madison County Public Library fund raiser with Mark Russell - raised $26,000 for the library.
1986 (approx.)	Huntsville-Madison County Public Library Development Council -- planned entertainment and decorations for kick-off dinner.
1985 - 1986	Chairman, Nominating Committee, Junior League of Huntsville, a 150 member non-profit corporation whose purpose is educational and charitable, *i.e.*, to promote the effectiveness of trained volunteers; annual budget: $100,000. Duties included recognizing and developing the leadership potential of members and matching them with appropriate community involvement.
1984 - 1985	President, Junior League of Huntsville - Duties included presiding over meetings and coordinating all educational and charitable activities.
1983 - 1984	Vice President, Junior League of Huntsville, Assisted President in duties described above.
1982 - 1983	President, Twickenham Historic District Association ("THPDA"). Partner, Hauer House Tea Room and Craft Exchange -- planned, developed and directed public relations and advertising.
1981 - 1982	Chairman, Weeden House Committee -- governing body of the Weeden House Museum. Organized the first Weeded House Docent Program.
1981	Planned, developed and directed publicity for the Lily Flagg Party to benefit Weeded House ($10,000 profit).
1980 - 1982	Planned, developed and directed with co-chairman first Panoply of the Arts held in Big Spring Park. Responsibilities included fund raising; public relations; site determination and coordination; public speaking; liaison with city, county, and state government officials, school systems and business owners; coordination of performers, students and volunteers. Budget: $50,000, plus solicited in-kind services of approximately $25,000.
1979 -1982	University of Alabama, Huntsville -- advisory Committee to Department of Arts and Humanities.
1979 - 1981	Huntsville Museum of Art -- docent.
1979 - 1981	Historic Huntsville Foundation. Membership Chairman (1980-1981). Board Member (1979-80).
1980	Historic Huntsville Foundation -- walking tours for children, guide.
1979	Co-Chairman, Apple Annie -- a fund raiser for the Community Trust Fund of the Junior League of Huntsville ($16,500 profit). Co-Chairman, Franklin Street Fair to benefit THPDA ($5,000 profit). Co-Chairman, Beaux Arts Ball to benefit the Arts Council ($10,000 profit).
1979	Randolph School, Huntsville -- Bridge benefit secretary, publicity committee, co-chairman for decorations.

1979 (approx.)	Senior High Sunday School Teacher, Young Couples Steering Committee -- church of the Nativity, Huntsville.
1979 (approx.)	Huntsville Middle School Pantheree -- flea market fund raiser.
	1977 - 1978 WLRH Public Radio, Huntsville -- volunteer cataloging and indexing.

(Griffith Exh. 1, pp. 2-3).

30. *Auxiliary Power*. Griffith proposes to install facilities for auxiliary power for the proposed station at the transmitter site only (Griffith Exh. 1, p. 3).

Linda L. Alt

31. Linda Alt is a sole proprietor (Alt Exh. 1).

32. *Integration*. Alt proposes to be 100% quantitatively integrated. She proposes to be the General Manager of the proposed station. She proposes to work on a full-time basis, at least 40 hours per week (Alt Exh. 1).

33. Alt first learned about the availability of the station in Meridianville from her brother-in-law, Donald Alt (Tr. 148). Donald Alt has ownership interests in other broadcast facilities (Tr. 149). Donald Alt provided Linda Alt with the name of her consulting engineer (Tr. 149). Donald Alt provided Linda Alt with the name of her legal counsel (Tr. 149). Donald Alt paid for the expenses of Linda Alt's engineer (Tr. 149). He contacted the bank in her behalf (Tr. 149).

34. Mrs. Alt did not personally send the bank any written material. Rather, her husband, Emile, sent the information (Tr. 150). Alt's husband has assisted her in the application process. The two located Alt's proposed transmitter site (Tr. 150-151). The two prepared Alt's public notice together (Tr. 152). Alt regards her husband as a "second pair of eyes." (Tr. 152). Alt's husband assisted in helping to prepare her budget (Tr. 152). Her husband sent this budget to the Boston bank (Tr. 153). Together, Mrs. Alt and her husband prepared Alt's programming statement that was included with her application (Tr. 153). All of Alt's prosecution expenses have been paid out of a joint checking account owned by her and her husband (Tr. 153). They have all of their money "in one pile." (Tr. 153). Mrs. Alt acknowledged that her husband had a financial interest in her application (Tr. 155).

35. Mrs. Alt presently is in the business of buying and selling antiques (Tr. 156). Although it is a sole proprietorship, her husband can write checks on her business account (Tr. 157).

36. Alt is a white female (Alt Exh. 2, p. 2).

37. *Local Residence*. For approximately 18 months from 1965 to 1967, Mrs. Alt resided in Huntsville, Alabama, within the service area of her proposed station. From 1982 to the present, she again has resided in Huntsville, within the service area (Alt Exh. 2, pp. 1-2). She plans to continue residing at or near her current residence in Huntsville (Tr. 148).

38. *Broadcast Experience*. Mrs. Alt claims no credit for past broadcast experience.

39. *Civic Activities*. In 1989, Mrs. Alt was elected a member of the Old Town Historic Preservation District Board of Directors in Huntsville. She now holds the position of Vice President in charge of membership for the board. This organization is designed to promote interest in historic Huntsville. In April 1989, Mrs. Alt helped the Old Town Historic District develop its "spring fling" held in Huntsville. This is designed to be an annual outing with games and activities for children (Alt Exh. 2, p. 2).

40. In 1982 and 1983, Mrs. Alt served as secretary to the East Clinton Elementary School Parent Teacher Association ("PTA"), which operates within the proposed service area of her station. She also performed volunteer fund raising work for the PTA approximately once per month for three or four hours from 1985 to 1986 (Alt Exh. 2, p. 3).

41. In September of 1984, Mrs. Alt served on the Chautauqua Fund Raising Committee ("Chautauqua") for the East Clinton Elementary School, which is located in Huntsville and within the service area of her proposed station Chautauqua is a day-long festival, featuring performing arts groups and tours of historic homes in Huntsville. Mrs. Alt sold tickets and assisted with the preparation of the festival. In both 1982 and 1989, Mrs. Alt opened her residence to the public as part of the festival. Proceeds from the festival were used to pay for books and supplies needed by the East Clinton Elementary School in Huntsville (*Id.*).

42. In the Spring of 1989, Mrs. Alt was in charge of the exhibits for an antique show sponsored by Twickenham Historic District Association which serves the Huntsville area. Proceeds were used to benefit the Maria Howard Weeden House Museum, which is located in Huntsville (*Id.* p. 4).

43. In both 1987 and 1990, Mrs. Alt served as a camp counselor for the Huntsville High School Cheerleaders. Huntsville High School is located within the service contour of her proposed station (*Id.* p. 4).

44. In 1986, Mrs. Alt was a guide at the creative arts tent for the Madison County School System's "Panoply of the Arts," a Huntsville area event focusing on the arts. She helped children in toy making and painting in the creative arts tent. The event is three or four days in length, is held each spring, and is open to all Huntsville area residents (*Id.*).

45. Mrs. Alt has been a member of the Red Stone Garden Club since 1982. The Red Stone Garden Club is located in Huntsville, within the service area of her proposed station. Mrs. Alt attends the monthly meetings held by the Red Stone Garden Club. In 1986 and 1987, she served as a historian of the Red Stone Garden Club (*Id.*). There is no mention in the hearing testimony as to any civic functions of the Red Stone Garden Club.

46. In 1989, Mrs. Alt assisted in the Huntsville Botanical Gardens' plant sale. Profits from the sale went to the construction of a new Huntsville facility for the Botanical Gardens Club. This club maintains greenery, plants and shrubbery in front of the main gate at the Red Stone Arsenal in Huntsville and in front of the child care center and fire stations at the Arsenal (*Id.* pp. 4-5).

47. Since 1982, Mrs. Alt has been a member of the Officer's Wives Club of Red Stone. The Club serves the entire Huntsville area. The organization holds meetings each month which she attends on a regular basis. She has

served on various club fund raising committees over the years. The Wives' Club donates each year to Huntsville area charities including the Boy Scouts, Girl Scouts, college scholarships, Red Cross, Botanical Gardens, Harris Home for Children and Hospice (*Id.* p. 5).

48. In May 1986, Mrs. Alt developed the Intergraph Corporation "Spouse Program," which was designed to familiarize those visiting Intergraph Corporation in Huntsville with the area's unique geographic and civic features. The program also includes a week-long series of seminars in which Mrs. Alt was involved on a full-time, 40 hour basis. Mrs. Alt spent three-to-four months in preparation for the touring and seminars (working five-to-ten hours per week on these activities). The program operates within the service area of her proposed station (*Id.*).

49. *Diversification.* Mrs. Alt has no interest in any medium of mass communication (Alt Exh. 4).

50. *Auxiliary Power.* Mrs. Alt will install an auxiliary power generation system at her proposed main studio and transmitter site to ensure continuous station operation in the event of a power outage (Alt Exh. 3).

KPI Communications, Inc.

51. *Ownership Structure and Control.* KPI is a corporation organized under the laws of the State of Delaware. KPI is authorized to issue one hundred shares of common stock. Twenty-five of these shares are designated as voting stock, the remaining shares are nonvoting. The stockholders of KPI, and the amount of stock held by each, are as follows:

Name	Number of Shares	Type of Stock	Percent of Ownership Interest	Percent of Voting Control
Charley S. Burruss	25	Voting	25%	100%
John C. Taylor	25	Nonvoting	25%	0%
Donna Taylor	25	Nonvoting	25%	0%
Landon McCrary	25	Nonvoting	25%	0%

52. Charley Burruss is the sole director of the corporation. He is KPI's sole officer, holding the positions of President, Treasurer and Secretary (KPI Exh. 1).

53. KPI was structured with voting and nonvoting stock in order to receive the most enhanced credit (Tr. 323). For this reason, it was decided that Burruss, who is Black, would hold all of the voting stock (Tr. 193).

54. KPI's certificate of incorporation was signed by Burruss on January 15, 1988; filed with the Delaware Secretary of State on January 21, 1988; and its stock was issued on January 25, 1988 (KPI Exh. 1, pp. 1-2). Three days later, on January 28, 1988, KPI's application was filed.

55. KPI grew out of an idea of Donna Taylor to start a new radio station in Huntsville (Tr. 183). She had been involved in radio previously as a sales person at a station in Jacksonville, North Carolina (Tr. 183, 226). When Donna Taylor suggested the idea of starting a radio station to her husband, John Taylor got the project going (Tr. 202). He contacted Skip White, a former business associate of Donna's at the radio station in Jacksonville, North Carolina (Tr. 183-84). Mr. White referred John Taylor to KPI's future engineer, Bob Purcell, and to several communications lawyers (Tr. 183, 184).

56. John Taylor talked to Mr. Purcell about the prospect of a frequency being allotted to Huntsville (Tr. 183). The Taylors learned from Mr. Purcell that the process of applying for and building a radio station was very expensive (Tr. 229). They decided at that point to bring in the other future KPI shareholders, Landon McCrary and Charley Burruss, in order to split up the financial burden (*Id.*). However, the two-tiered structure of KPI was not to be decided on until much later, after discussions with Dan Van Horn, KPI's communications counsel (*Id.*). Mr. Van Horn was chosen by Mr. Taylor, who recommended him to the rest of the group (Tr. 184, 186).

57. John Taylor first spoke with Mr. Van Horn on December 1, 1987 (Tr. 192). Mr. Van Horn told Taylor about the various criteria considered by the FCC during a comparative hearing, including the credit given for minority ownership and integration (Tr. 193). Van Horn told John Taylor how to structure his organization in order to receive the maximum credit at a comparative hearing (*Id.*). Taylor conveyed to the rest of the group Van Horn's suggestions, including having a minority-controlled company (Tr. 195).

58. John Taylor also worked directly with KPI's engineer, Bob Purcell being in contact with him several times prior to the filing of KPI's application (Tr. 201). John Taylor took the lead in finding a transmitter site (Tr. 187). Purcell provided the KPI principals with a map of the area in which to locate transmitter site (*Id.*). John Taylor then went to the local courthouse to see who owned the property in the area and proceeded to contact those people (Tr. 188). Burruss also had some real estate contacts and helped contact people in the designated transmitter site area (*Id.*). As of January 9, 1988, John Taylor was still involved in looking for a transmitter site (Tr. 211).

59. Prior to the formation of KPI in late January 1988, KPI's expenses had been paid out of Kudzu Productions' account (Tr. 315). KPI did not establish a checking account until January 27, 1988, the day before its application was filed with FCC (Tr. 317, 357).

60. John Taylor had first met Charley Burruss around 1975 while Taylor was in the Army and Burruss was working on a film project for the Army (Tr. 170). In 1978, Burruss and Taylor began working on projects together (Tr. 171). Meanwhile, around 1975 or 1976 John Taylor met Landon McCrary, also in connection with Taylor's film production work (Tr. 172). McCrary and Burruss were both employed on the staff, or freelanced with John Bransby Productions (Tr. 173). John Taylor worked with McCrary for the first time in 1977 or 1978. By the late 1970's, however, John Taylor, McCrary and Burruss had become personal friends and visited socially with each other at their homes (Tr. 175). In 1979, the three decided to join together and form their own video production company, Kudzu Productions, Inc. ("Kudzu") (*Id.*).

61. The three decided to structure Kudzu Productions so it would qualify as a minority-controlled company in order to receive government preferences (Tr. 176). For Kudzu Productions, these preferences were available through the "Section 8(a)" program administered by the Small Business Administration (Tr. 176, 301). Under this program, federal government contracts were set aside for

minority-controlled companies in order to encourage minority entrepreneurs (Tr. 301-02). To qualify as a minority-controlled company, not only must the majority of the stock be owned by a minority, but the day-to-day management and control of the company must also be in the hands of a minority (Tr. 302). Kudzu Productions was established with Burruss owning 51% of the stock in order to qualify as a minority-controlled company.

62. Though Kudzu Productions was established with Burruss being the nominal 51% stockholder in order qualify as a minority-controlled company, in actuality control of Kudzu Productions has been shared equally among John Taylor, McCrary and Burruss. They work together, discussing with each other all major corporate decisions, and share the responsibilities, duties and confidences of the business (Tr. 300). In terms of the production aspect of their business, they work as co-equals (Tr. 197). Burruss has not received remuneration corresponding to his 51% ownership of the corporation.

63. Burruss testified that if KPI is awarded the construction permit, he will nonetheless continue to receive information from Kudzu on a day-to-day basis, and will continue to exercise managerial authority at Kudzu (Tr. 338). He will take telephone calls at the radio station to discuss matters of importance concerning Kudzu (Tr. 339).

64. Together, Burruss, McCrary and Taylor own a company called BMT. The three are equal partners in BMT. Each owns one-third. BMT owns the building in which Kudzu operates its business (Tr. 224-225). The BMT partnership also owns video production equipment (Tr. 318).

65. *Integration*. If KPI's application is granted, Charley Burruss will reside within KPI's proposed 1.0 mV/m contour and will work full time (at least 40 hours per week) as the station's general manager. In this capacity, he will have all of the duties and responsibilities normally associated with a radio station general manager, including hiring, firing, and overall supervision of all station employees, preparation and monitoring of station budgets, review of the station's financial performance, formulation and approval of programming, promotion, and public service policies, establishment of sales goals and practices, and administration and implementation of the station's equal employment opportunity program (KPI Exh. 3, p. 1).

66. Burruss is the President, Chairman of the Board, Chief Executive Officer and controlling stockholder of Kudzu Production, Inc. He currently manages Kudzu Productions' day-to-day operations on a full-time basis. Both John Taylor and Landon McCrary are officers and directors of Kudzu Productions and each holds a non-controlling stock interest in and is a full-time employee of the company. If KPI's application is granted, John Taylor and Landon McCrary will continue to be employed by Kudzu Productions on a full-time basis and propose to take over the day-to-day managerial responsibilities which are currently exercised by Burruss (KPI Exh. 3, pp. 2-3).

67. If KPI's application is granted, Burruss does not plan on relinquishing his ownership in Kudzu Productions (Tr. 337). He plans on continuing to exercise managerial authority at Kudzu Productions, and having the final say in all major decisions (Tr. 339). He will continue to receive information on a day-to-day basis from the people working at Kudzu Productions in order to make his managerial decision (*Id.*). He will accept phone calls while working at KPI's radio station, so he can discuss matters of importance concerning Kudzu Productions (Tr. 339-40). He will, if necessary, spend the time to make important decisions while working at the radio station (Tr. 340). Burruss is currently spending in excess of 40 hours a week performing managerial functions at Kudzu Production (Tr. 341).

68. KPI did not present any other evidence, on direct or redirect, as to how Burruss' managerial, administrative, and vital sales functions will be performed by John Taylor and McCrary.

69. *Local Residence*. Charley S. Burruss has lived within the service area of the proposed station from 1954 until 1969, and at various addresses from 1972 until the present. Mr. Burruss has stated that he will reside within the service area of the proposed station should KPI's application be granted (KPI Exh. 3, pp. 102).

70. Charley S. Burruss is a black male.

71. *Broadcast Experience*. For approximately two years, during 1962-1964, Burruss was employed at Station WEUP(AM), in Huntsville, initially as a trainee and then as an on-air personality on a weekly afternoon gospel program and on a Saturday morning pop show (KPI Exh. 3, p. 3).

72. *Civic Activities*. Burruss has been involved in the following civic activities: In 1978, he volunteered his services to help produce a fund raising film for the local chapter of the United Way serving Madison County (Huntsville), Alabama (KPI Exh. 3, p. 4). His work consisted of being a location sound recorder for part of the film (Tr. 341).

73. In 1978, Burruss helped the local public relations director of the United Way to develop a plan for the organization's 1979 fund raising drive (KPI Exh. 3, p. 4).

74. In 1979, Burruss donated a day's time to the Huntsville Alumni Chapter, Delta Sigma Theta, Inc. by participating in an activity wherein students went to a community center in Madison County to see and hear young African-American professionals who serve as role models and challenge them to stay in school and reach for personal success (KPI Exh. 3, p. 4; Tr. 342). Burruss' involvement consisted of giving a speech and participating in a question and answer session (Tr. 342).

75. For approximately two years and a period extending from 1982 through 1984, Burruss served on the Board of Advisors to the Alabama Film Makers Co-Op. In this capacity, he helped to establish long-range goals for the organization and provided guidance and assistance to the organization's founder and director. The purpose of the organization is to develop the audio-visual interests of young people in Madison County, and to provide a forum for instruction and hands-on experience in the audio-visual field (KPI Exh. 3, pp.4-5). He was not involved in any productions with the Alabama Film Co-Op nor did he provide classroom type instruction to anyone (Tr. 344). He was involved in a couple of seminars during the time he was active with the organization (*Id.*). The majority of his work consisted of going to meetings, of which he attended less than ten (Tr. 343).

76. In 1983, the Chamber of Commerce of Huntsville/Madison County approached Kudzu Productions with the idea of producing a slide show for the community to use in attracting high technology business to Madison County. Kudzu Productions donated the company services for the production of a motion picture, instead of a slide show (KPI Exh. 3, p. 5). Burruss himself is not

personally a member of the Chamber of Commerce; nor is there evidence that he himself produced the movie (Tr. 344).

77. Between 1984 and 1986, Burruss devoted a day each year to the Alabama AM Media Careers Conference held at Alabama AM University. The purpose of the conference was to inform university students of current trends in the audio-visual industry and of job opportunities that they could pursue after graduation (KPI Exh. 3, p. 5).

78. In 1985, Burruss helped establish Madison County Scouts Post 54 of the Boy Scouts of America, and was appointed scouting coordinator for that post for the 1985-1986, 1987-1988 and 1988-1989 scouting years. The Post, which meets at the offices of Kudzu Productions in Huntsville once a month for a nine-month period during each scouting year, was established to help Madison County scouting coordinators respond to the interests of scouts in the audio-visual industry. During each nine-month session, the scouts are exposed to professional audio-visual technicians and are given technical instruction. In the past, the instruction has culminated in audio production prepared by the scouts under the supervision of Burruss and Kudzu Production's staff (KPI Exh. 3, p. 6).

79. For a little over a year, Burruss has served on the Board of Directors of the Arts Council, Inc. (Tr. 349). The Council is the focal point for arts activity for Huntsville and the surrounding area (KPI Exh. 3, pp. 6-8). As a member of the Board of Directors, Burruss participates in the establishment of long range goals and policies governing the administration and operation of the Council. Meetings of the Board are held once a month and last approximately one hour. Burruss has also served on the Council's Facilities Committee and the Marketing/PR Committee, which meet approximately twice each month (*Id.*).

80. *Diversification.* Except for its application for a new FM station in Meridianville, Alabama, neither KPI, nor any of its stockholders have any interest in any radio or television station, cable television system, newspaper, or other medium of mass communications (KPI Exh. 2).

81. *Auxiliary Power.* KPI proposes to install auxiliary power facilities in order to permit continued broadcast operations in the event normal power sources fail (KPI Exh. 4).

CONCLUSIONS OF LAW

Diversification

82. None of the four applicants in this proceeding has any attributable interest in, or connection with, any radio, television, or cable television station, or any other medium of mass communications.

BEST PRACTICAL SERVICE

Frank Digesu, Sr.

83. As a sole proprietor, Frank Digesu, Sr. is entitled to 100% quantitative integration credit for his proposal to work on a permanent full-time basis as the general manager of the proposed station.

84. Mr. Digesu is entitled to 100% substantial enhancement for his long time residence within the service area of the proposed station, and for his promise to continue living permanently within the service area should his application be granted.

85. Mr. Digesu is also entitled to a 100% substantial enhancement for his civic activities within the service area of the proposed station.

Virginia Griffith

86. Virginia Griffith is entitled to 100% quantitative integration credit for her proposal to work on a permanent full-time basis as the general manager of the proposed station.

87. Mrs. Griffith is entitled to 100% substantial enhancement for her long time residence within the service area of the proposed station and for her promise to continue living permanently within the service area should her application be granted.

88. Mrs. Griffith is entitled to a 100% substantial enhancement for her civic activities within the service area of the proposed station.

89. Mrs. Griffith also receives an additional slight enhancement credit for her six years of broadcast experience, and a significant preference for her female status.

90. The competing applicants, Digesu and Alt challenge the Griffith integration proposal stating that Mrs. Griffith is merely a front for her husband. They point out that Mr. Griffith has been a radio station owner for some time and that he and his company went through the Rule Making process to ensure the availability of Channel 231A. They believe that in light of this, Mr. Griffith maintained interest in and control of the Griffith application. They allege that this belief is buttressed by the fact that during a television interview with Mr. and Mrs. Griffith, Mr. Griffith monopolized the interview and the fact that Mr. Griffith is a co-guarantor on the proposed bank loan.

91. All of these contentions are speculative. Mrs. Griffith's integration proposal is credible. She has the ability to run a radio station. Her past broadcast experience proves it. Mr. Griffith has pledged to divest himself of any and all media interests. There is no record evidence that he will not honor this pledge. Furthermore, he is a medical doctor carrying on an full-time practice. This fact belies the allegation that he has an abiding interest to control the operation of the proposed station. The Commission has recognized that a husband and wife may discuss aspects of a broadcast operation, and without more, this is not indicative of the sharing of control. There is nothing unusual for a spouse of an applicant to act as a co-guarantor on a bank loan.

92. Alt also charges that Mrs. Griffith lacks candor in that she denied discussing any aspect of her pending application with her husband. However, the record indicates otherwise. She allowed that she consulted with her husband on matters regarding site acquisition and loan guarantee. Additionally, there is no record proof that Mrs. Griffith will not honor her divestiture pledge.

Linda L. Alt

93. Mrs. Alt seeks to be credited 100% for her integration proposal. Although there is no record evidence that indicates that Mrs. Alt will not be involved in the day-

to-day management of the proposed station, there is evidence that indicates that she will not be the sole control of the proposed station.

94. Alt was assisted during the application process by her husband, Emile A. Alt. He helped complete her application, find a transmitter site, comply with the public notice with his brother Donald, and also made the arrangements for Alt's financing. Alt's husband has a financial interest in another business which Alt purportedly runs as a sole proprietorship. He shares profits and losses in that business. Moreover, Alt helped pay for all of her expenses in this case. The two share all expenses through use of a joint checking account and Alt considers her husband to be her "partner" in every way.

95. In *Richard P. Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989), *rev. denied* 5 FCC Rcd 2508 (1990) (appeal pending), the Board awarded a sole proprietor only 50% integration credit where her husband appeared to be a 50% unintegrated owner. *Bott, supra*. Like Alt's husband and his brother, the applicant's husband in *Bott* helped retain the engineer and legal counsel, paid the prosecution expenses out of a joint account controlled by both, assisted in the financial certification -- basing it upon joint finances, helped find the transmitter site and assisted throughout the application process. It was held that the applicant and her husband would likely function as a "marital unit" in the operation of the station. Alt's husband and brother-in-law have been similarly involved in the financing and control of her application. Moreover, she considers her husband her partner and admits she has involved him financially in the business she claims to run as a sole proprietorship. Therefore, Alt will be awarded only 50% integration credit.

96. Alt's 50% integration credit is substantially enhanced by Mrs. Alt's long-term residence within the 3.16 mV/m contour area of her proposed station, and substantially enhanced by Mr. Alt's civic participation. It is also enhanced by Mrs. Alt's female status.

KPI Communications, Inc.

97. KPI seeks 100% integration credit based on its claim that its sole voting stockholder will be involved in the full time, day-to-day management of the proposed station. However, it is deemed that notwithstanding its corporate structure and claim all of the KPI equity owners will jointly manage the proposed station. Three of KPI's stockholders, Charley Burruss, John Taylor, and Landon McCrary, first came together in a common venture in 1969 to form a video production company, Kudzu Productions, Inc. [3] Kudzu was structured so that it would be eligible for Section 8(a) set aside contracts administered by the Small Business Administration. Eligibility depended upon whether the company was not only run by a minority, but also whether it was more than 50% minority owned. Nevertheless, control of Kudzu was shared equally by the stockholders and they worked as co-equals.

98. Additionally, it appears that Kudzu's three shareholders formed another company, a real estate partnership wherein each holds a 33 1/3% ownership interest.

99. The initial idea to obtain a radio station construction permit came not from Burruss, but from Donna Taylor. Mrs. Taylor was formerly involved in radio sales. She discussed the idea with her husband John. John contacted KPI's consulting engineer, and made arrangements for him to prepare engineering. John spoke to the engineer on a number of occasions. John also searched for KPI's transmitter site, researching at the courthouse and talking to realtors and land owners.

100. John Taylor also searched for KPI's communications counsel. He made the initial contact with its current counsel. KPI's counsel informed the partners of KPI about the criteria which the FCC utilized in awarding radio station construction permits. Thus, when KPI was formed, the stockholders were aware of the FCC's preference for minorities. It was at this point in time that the Taylors officially bowed out and Burruss stepped in as the sole voting principal of KPI.

101. Burruss is not selling any of his ownership interest in Kudzu, and Burruss will retain a substantial amount of his day-to-day authority and input at Kudzu. Burruss will continue to have a say in policy and financial matters of Kudzu. He will continue to receive information from Kudzu on a day-to-day basis, and will continue to exercise managerial authority at Kudzu. Some of KPI's prosecution expenses have been paid by checks drawn on an account in the name of Kudzu Productions, Inc.

102. Record evidence shows that the three Kudzu shareholders have in the past considered themselves to be on equal footing with one another as far as management and control of Kudzu was concerned. Considering the circumstances under which KPI was formed, in all likelihood the KPI shareholders will feel and act the same. KPI has failed to demonstrate that, considering the activities of the principals in the past, Burruss has adequately distanced himself from the non-voting shareholders so as to avoid sharing control of the management of the station. It is deemed that all of KPI's shareholders will participate in the control of the proposed station. Inasmuch as only Charley Burruss is proposed for day-to-day management -- KPI only is credited for integration purposes to the extent of his equity interest -- 25%.

103. KPI's 25% integration credit is substantially enhanced by Burruss' long term residence within KPI's proposed 1 mV/m coverage contour, and civic activities. KPI is also credited with 25% minority ownership. Burruss' broadcast experience is too distant and insufficient to be creditable.

ULTIMATE CONCLUSIONS

104. The case must turn on the consideration of comparative factors. Alt's and KPI's integration proposals have been credited only 50% and 25%, respectively. For Alt and KPI the quantitative difference between each of them and Digesu and Griffith is decisive (more than 12 1/2%). *See New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981). Neither can overcome the quantitative disparity by qualitative enhancement credits. Alt and KPI are eliminated.

105. The case between Digesu and Griffith turns on the consideration of qualitative factors. Each of their integration proposals has been credited 100%. Both Griffith and Digesu have been credited with substantial enhancement for local residence. Although each proposal also is substantially enhanced by their respective civic participation, Griffith must receive the edge for more diverse contacts in the community and greater amount of civic participation in more recent past. Additionally, Griffith's proposal is enhanced by Mrs. Griffith's broadcast experience and female status. Digesu proposes to install facilities for aux-

iliary power at both the transmitter and studio location, whereas Griffith only will have auxiliary facilities at the transmitter site. However, this edge for additional facilities does not help Digesu overcome Griffith's edge for civic activities, broadcast experience and female status. Griffith is the clear winner.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Virginia Griffith (File No. BPH-880127MN) for a Construction Permit for a new FM station to operate on Channel 231A at Meridianville, Alabama IS GRANTED, and the applications of Frank Digesu, Sr. (File No. BPH-880126ME), Linda L. Alt (File No. BPH-880128MO) and KPI Communications, Inc. (File No. BPH-880128MW) ARE DENIED[4]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] Eight applications were originally designated for hearing for the new Meridianville station. However, one of the applicants was dismissed with prejudice for failure to file a Notice of Appearance and pay the required hearing fee. *See Order*, FCC 90M-1683, released June 15, 1990. In addition, three of the applicants were dismissed with prejudice, pursuant to Section 73.3525 of the Commission's Rules in response to their respective motions for voluntary dismissal. *See Order*, FCC 90M-1168, released May 11, 1990, *Order*, FCC 90M-3434, released October 31, 1990 and *Order*, FCC 90M-3920, released December 12, 1990.

[2] It should be noted that five additional issues were designated in the original *HDO*. In view of the fact that the five additional issues related to the subsequently-dismissed applications, those issues are moot.

[3] When Kudzu was organized, it was a Subchapter S corporation.

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-340

In the Matter of

Amendment of the Aviation Services Rules concerning the frequency tolerance for VHF aircraft radios.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1991; Released: August 5, 1991

By the Commission:

I. INTRODUCTION

1. By *Notice of Proposed Rule Making* (*Notice*), 5 FCC Rcd 4803 (1990), we proposed to amend Part 87 of the Commission's Rules, 47 C.F.R. Part 87, to "grandfather" indefinitely all currently installed VHF aircraft transmitters with 50 kHz channel spacing. This "grandfather" provision proposed to permit such transmitters to meet a frequency tolerance of 50 parts per million (ppm) instead of the 30 ppm frequency tolerance requirement which was to become effective on January 1, 1990.[1] This Report and Order modifies the proposed rule to grandfather the subject aircraft VHF transmitters until January 1, 1997.

II. BACKGROUND

2. The Commission amended its Rules in 1973 to provide for 25 kHz channel spacing in the 117.975-136 MHz aviation band.[2] In that proceeding the Commission was faced with the same dilemma addressed in this proceeding: how to balance the need for improved aeronautical communication capabilities against the need to provide fairly for the equity that general aviation operators have in existing equipment employing 50 kHz channels. The Commission decided not to establish a cut-off date for operation of 50 kHz equipment because transmitters with channel spacings of 25 kHz and 50 kHz can coexist and there was no definitive Federal Aviation Administration (FAA) implementation program establishing a time for total system conversion to 25 kHz spaced air traffic control (ATC) channels. [3] *See Report and Order* para. 16. The Commission noted, however, that airborne equipment tolerances could not remain at 50 ppm, that is 50 kHz channel spacing, on a permanent basis.[4] *See Report and Order* para. 22.

3. In 1984 the Commission amended the frequency tolerance requirements for aircraft radio stations operating in the frequency bands from 100 MHz to 470 MHz.[5] Under those rules, 30 ppm is the maximum frequency tolerance permitted for new and replacement transmitters after January 1, 1985, and for all transmitters operating in this band after January 1, 1990. The effect of this rule was to require modification or replacement of all aircraft transmitters operating in the 100 MHz to 470 MHz band that do not meet the 30 ppm frequency tolerance by January 1, 1990. No comments or objections were received when the Commission proposed and adopted a cut-off date for the use of VHF aircraft radios with a 50 ppm frequency tolerance.

4. The *Notice* in this proceeding was issued in response to a letter dated July 31, 1989, from the Aircraft Owners and Pilots Association (AOPA), the Experimental Aircraft Association, the General Aviation Manufacturers Association, and the Helicopter Association International (hereafter petitioners). Petitioners argued that the broad ramifications of obsoleting VHF aircraft radios with a 50 ppm frequency tolerance were not considered in the Commission's 1984 decision and estimated that as many as 93,000 radios are currently installed in the general aviation fleet that do not meet the new frequency tolerance requirement. They pointed out that these radios are installed in small, single-engine, piston-powered aircraft. Petitioners estimated that the cost to the general aviation community of modifying or replacing these radios to comply with this rule could range from $60.5 million to $232.5 million.[6] Because the changes to the frequency tolerance requirements were taken in the broad context of the World Administrative Radio Conference, Geneva, 1979, (WARC 79) upon which the general aviation community did not specifically focus, and because a large number of aircraft radios would be made obsolete by the changes, we decided to reexamine this issue.

III. DISCUSSION

5. Comments strongly supporting indefinite grandfathering were filed by numerous members of the aviation community, including individual pilots and aircraft owners, the Experimental Aircraft Association (EAA) and the Aeronautics Division of the Department of Commerce, State of Montana. Comments adamantly opposing indefinite grandfathering were filed by the Air Line Pilots Association, Aeronautical Radio, Inc. (ARINC), Air Transport Association (ATA), the Federal Aviation Administration (FAA), and the National Business Aircraft Association, Inc. (NBAA). No reply comments were filed.

6. Most of the comments from the general aviation community focus on the cost of replacing or modifying the 50 kHz channeled radios. Commenters argue that such costs are an unnecessary burden because the FAA has not implemented 25 kHz channels nationwide and, thus, requiring the replacement of older radios in aircraft operating in remote areas is premature. Further, many commenters note that they have operated these radios without causing or receiving interference due to the 50 kHz channeling.[7]

7. Commenters who oppose the proposal to grandfather indefinitely all aircraft radios with 50 kHz spaced channels argue that the continued use of such radios is spectrally inefficient and adds to congestion on aviation frequencies. Additionally, they contend that the economic impact to general aviation is overstated because many aircraft operators have installed newer radios. ARINC and the FAA also argue that there may be potential adjacent channel interference problems with the older 50 kHz

radios when they are operated in the same environment as 25 kHz channeled radios. ARINC comments at 4. FAA comments at 2.

8. The FAA states it has been experiencing shortages in VHF air traffic control (ATC) communications channels in the 118-136 MHz aeronautical band.[8] One obstacle to resolving the shortage is that the FAA has attempted to satisfy the needs of the general aviation community whenever possible by retaining a minimum capability on ATC channels with 50 kHz and 100 kHz spaced channels. In order to do this the FAA states that it does not assign ATC channels on adjacent 25 kHz channels.[9] It has become, the FAA states, highly impractical to continue this practice because of congestion and the inefficient use of needed spectrum. The FAA concludes that a primary impact on aviation users without 25 kHz channel radios is that they will not be able to obtain all ATC services available and may encounter flight delays or rerouting when they fly in ATC designated areas. FAA comments at 1 and 2.

9. ARINC and NBAA also object to the continued use of 50 kHz spaced radios because of the current frequency congestion problems and the spectrum inefficiencies associated with the use of such equipment. Additionally, ARINC points out that the requirement for a transition to a 25 kHz spaced environment has been known since the 1970s.[10] ARINC comments at 1. NBAA comments at 1.

10. In light of the comments received we believe that a reasonable compromise would be to grandfather such transmitters for an additional five years, until January 1, 1997. This will permit the general aviation community to replace older transmitters in a cost effective manner and will permit the FAA and the FCC to implement further 25 kHz spaced assignments. General aviation has had eighteen years advance notice that 25 kHz channeling was coming and, as many general aviation commenters noted, aircraft owners are replacing these transmitters as they wear out or as they need to fly into FAA-controlled airspace.[11] Further, the Commission recently allocated the 136-137 MHz band which was made available by the 1979 World Administrative Radio Conference for aviation use.[12] Entities purchasing new radios will be able to communicate on this important new aviation band. Additionally, as we emphasized in the *Notice*, the Commission has the responsibility to manage this spectrum efficiently. Without a cutoff date we are concerned that there will be unacceptable delays in the full implementation of more efficient ground station assignments in this critical aeronautical band.

11. Finally, the FAA and ARINC raised the issue of adjacent channel interference. In Docket 19647 we considered this issue and concluded, based on FAA comments, that a mixed environment of 25 kHz and 50 kHz channeled equipment would be acceptable during the FAA's implementation of 25 kHz spacing.[13] We emphasize here that when the FAA incorporates 25 kHz channel spacing aircraft operators will have to equip with 25 kHz spaced radios to receive air traffic services. There are, however, many rural areas with little congestion where 25 kHz air traffic services are not yet available. Therefore, we are grandfathering VHF aircraft station radios with a frequency tolerance of 50 ppm (50 kHz channel radios) until January 1, 1997.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED That pursuant to the authority contained in Sections 4(i), 303(g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g) and (r) Part 87 of the Commission's Rules are AMENDED as set forth in the Appendix below.

13. IT IS FURTHER ORDERED That this Report and Order will be effective on **September 19, 1991.**

14. IT IS FURTHER ORDERED That a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

15. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

V. CONTACT

16. For further information contact W. P. Berges, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 87 - Aviation Services.

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.133(a) is amended by adding footnote 10 to the table in paragraphs (a)(5) and (a)(6) to read as follows:

§ 87.133 Frequency stability.

(a) * * *

Frequency band (lower limit exclusive, upper limit inclusive), and categories of stations	Tolerance[1]	Tolerance[2]
(5) * * *		
Aircraft and other mobile stations in the Aviation Services	50[5]	30[10]

* * * * *

(6) * * *		
Aircraft stations	50[5]	30[10]

* * * * *

[10] Until January 1, 1997, the maximum frequency tolerance for transmitters with 50 kHz channel spacing installed before January 2, 1985, is 50 parts in 10^6.

* * * * *

FOOTNOTES

[1] This date was extended to January 1, 1992, by the Chief, Private Radio Bureau, under delegated authority. *See* Order, 4 FCC Rcd 7126 (1989).

[2] *See* Report and Order, Docket 19647, 38 Fed. Reg. 29077 (1973).

[3] Channel spacing refers to the separation between two adjacent channels. If channels are spaced 50 kHz (.05 MHz) apart, then channels are assigned on frequencies that end in some multiple of .050, *e.g.* 122.000 and 122.050 MHz. Likewise, if channels are spaced 25 kHz (.025 MHz) apart, then channels would be assigned on multiples of .025, *e.g.* 122.000, 122.025, 122.050 and 122.075 MHz.

[4] In the Notice we explained that implementation of the 30 ppm frequency tolerance is associated with the use of more spectrum efficient 25 kHz channel spaced radios and the 50 ppm frequency tolerance with 50 kHz channel spaced radios.

[5] In an Order, FCC 84-220, 49 Fed. Reg. 21737 (1984), the Commission amended Section 87.65 of the Rules, 47 C.F.R. § 87.65. Section 87.65 has since been recodified as Section 87.133, 47 C.F.R. § 87.133. *See* 53 Fed. Reg. 28940 (1988).

[6] The estimated cost is based on 93,000 radios using an estimated modification cost of $650 and replacement cost, including installation, of $2500.

[7] *See* comments of Mr. Dwane D. Koppler at 1, Mr. Douglas F. Price at 1, Ms. Donna S. Robinson at 1 and EAA at 1.

[8] ATC channels are used by the FAA to control aircraft operations in designated areas. Aircraft operating outside of such areas are not required to communicate with the FAA or to be equipped with radios.

[9] The FAA's reason for not assigning ATC channels with 25 kHz spacing is its conclusion that 50 kHz channelled radios may be susceptible to interference from such assignments. Transmitters type accepted for 100 kHz channel spacing may no longer be used. *See* Notice, *supra* para. 4-6.

[10] The Commission began the transition to 25 kHz channel spacing in 1971 and has continued to implement 25 kHz channels as the need arises. *See*, for example, Docket No. 18531, 31 FCC 2d 193 (1971) and PR Docket No. 87-214, 3 FCC Rcd 4171 (1988). The FAA first announced its intention to implement 25 kHz channels for general aviation in 1973, 38 Fed. Reg. 29077 (1973).

[11] Since January 1, 1985, all new installations of aircraft radios have had to meet the 30 ppm frequency tolerance. Additionally, we note that all aviation transmitters type-accepted since January 1, 1974, have had to meet the 30 ppm frequency tolerance. *See* Section 87.133, 47 C.F.R. § 87.133.

[12] *See* Report and Order, Docket 89-295, 5 FCC Rcd 3954 (1990).

[13] *See* Report and Order, Docket No. 19647, 43 FCC 2d 179 (1973).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Standards for Assessing
Forfeitures

POLICY STATEMENT

Adopted: July 11, 1991; Released: August 1, 1991

By the Commission:

I. INTRODUCTION

1. In this Policy Statement, we establish standards for assessing forfeitures. These standards are set forth in the Appendix. We intend to be guided in the future by these standards, although we note that we remain "free to exercise. . . discretion in situations that arise" in specific cases. *See Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Co.*, 589 F.2d 658, 666 (D.C. Cir. 1978).

II. BACKGROUND

2. The Commission has traditionally assessed forfeitures on a case-by-case basis, in light of relevant precedent. In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 100-239, 103 Stat. 2131. As the Commission implements this increased forfeiture authority, we believe it is appropriate to depart from our traditional case-by-case approach and adopt more specific standards for assessing forfeitures. Such standards will assist the Commission in ensuring that similarly situated violators are treated in a comparable manner, and will provide guidance to the public regarding the forfeitures that can be expected in connection with specific violations. (The Commission remains free, of course, to respond to violations with other or additional action, for example, admonishment, revocation or nonrenewal.) Establishing forfeiture standards is consistent with a recommendation of the Administrative Conference of the United States (ACUS), and is similar to approaches taken by some other independent regulatory agencies. *See Agency Assessment and Mitigation of Civil Money Penalties, Recommendation No. 79 - 3*, 1 C.F.R. § 305.79-3; *General Statement of Policy and Procedure for NRC Enforcement Actions*, 10 C.F.R. Chapter 1, Part 2, Appendix C.

III. DISCUSSION

3. *Section 503 Forfeitures.* Most Commission forfeitures are issued under the Commission's general forfeiture authority contained in section 503 of the Act. Under section 503(b)(2), for each violation or each day of a continuing violation, the Commission may now assess forfeitures of up to $25,000 against broadcasters, cable operators or applicants for such facilities, $100,000 against common carriers or applicants for such facilities, and $10,000 against others. In addition, there is a limit on forfeitures for continuing violations involving a single act or failure to act of $250,000 for broadcasters, cable operators or applicants for such facilities and $1,000,000 for common carriers or applicants for such facilities. A limit of $75,000 applies to continuing violations involving a single act or failure to act by others.

4. Our new standards for section 503 forfeitures establish base forfeiture amounts for specific classes of section 503 forfeitures. The base forfeiture amounts are based on a ranking of the relative gravity of the violation involved. The base amounts are computed as a percentage of the statutory maximum for the service involved. For example, failure to comply with prescribed tower lighting and marking requirements is generally an extremely grave offense and thus has a base forfeiture amount of 80 percent of the relevant statutory maximum -- $20,000 for broadcasters and cable operators, $80,000 for common carriers and $8,000 for others. In contrast, failure to provide required station identification is generally a more minor offense and thus has a base forfeiture amount of 10 percent of the relevant statutory maximum -- $2,500 for broadcasters and cable operators, $10,000 for common carriers and $1,000 for others. We recognize that one effect of this approach is that licensees in different services will receive different forfeitures for the same offense. We believe this approach is consistent with congressional intent in establishing different statutory maxima for different services, and at the same time ensures that all similarly situated entities are treated similarly.

5. Once the relevant base forfeiture amount is determined for a section 503 forfeiture, the next step under our standards is to apply the relevant upward and downward adjustment criteria to the base amount. Each of the upward and downward adjustment criteria is assigned a specific percentage range that is applied against the base forfeiture amount. The adjustment criteria we have selected are derived from section 503(b)(2)(D) of the Act, which instructs the Commission to "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." In establishing specific criteria to carry out this statutory mandate, we have also been guided by the ACUS recommendation on forfeiture standards. *See* 1 C.F.R. § 305.79-3 (suggesting that agencies take into account the economic benefit of the violation, the harm caused by the violation and the violator's financial condition).

6. How the standards work can be illustrated with the following example involving a broadcast licensee who, for one day, broadcasts using unauthorized equipment. Under the standards, a base forfeiture amount of $10,000 is established. If the relevant upward adjustment criteria were determined to be a 70% increase for intentional violation and a 40% increase for substantial harm, each of which is within the range established in the standards, increases of $7,000 (70% of $10,000) and $4,000 (40% of $10,000) would be added to the base forfeiture, for an adjusted forfeiture of $21,000. If it were also determined that there should be a 30% downward adjustment for a history of overall compliance by the licensee, which is also within the established range, the forfeiture would be reduced by $3,000 (30% of 10,000) to $18,000. If the broadcaster made a specific showing that an $18,000 forfeiture would cause substantial economic hardship, the

forfeiture would be further reduced.[1] If application of the criteria led to an amount exceeding the statutory ceiling, the forfeiture amount would be reduced to the statutory ceiling.

7. *Non-Section 503 Forfeitures.* Various sections of the Communications Act provide the Commission with forfeiture authority regarding specific statutory violations. These sections of the Act generally state a prescribed forfeiture amount (rather than a maximum) for violation of that section. For example, section 220(d) of the Act provides that a common carrier that fails to comply with prescribed accounting and other record-keeping requirements shall forfeit $6,000 per day. Under our forfeiture standards, such statutory amounts will be used as the base forfeiture amounts for non-section 503 forfeitures. Consistent with section 504(b) of the Act, which permits remission or mitigation by the Commission, the same downward adjustment criteria to be used in section 503 forfeiture proceedings will also be used in non-section 503 forfeiture proceedings.

IV. CONCLUSION

8. We believe adoption and publication of these forfeiture policies will assist the Commission in ensuring that similarly situated violators are subjected to comparable forfeitures and will aid our enforcement efforts by making clear in advance the likely consequences of violations.

9. Accordingly, IT IS ORDERED that this Policy Statement IS ADOPTED, TO BE EFFECTIVE upon publication in the Federal Register.

10. The notice and comment and effective date provisions of the Administrative Procedure Act do not apply to this Policy Statement. 5 U.S.C. §§ 553(b)(A), (d)(2).

11. This action is taken pursuant to sections 4(i), 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223, 303(r), 364, 386, 503(b), 504, 506 and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223, 303(r), 362, 386, 503(b), 504, 507, 554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *See* Appendix, note 6.

APPENDIX

STANDARDS FOR ASSESSING FCC FORFEITURES

I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

Violation	% of Stat. Max.[1]	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Misrepresentation/lack of candor	80%	20,000	80,000	8,000
Failure to comply with prescribed lighting and marking	80%	20,000	80,000	8,000
Construction and/or operation without an instrument of authorization for the service	80%	20,000	80,000	8,000
Unauthorized substantial transfer of control	80%	20,000	80,000	8,000
Violations of rules relating to distress and safety frequencies	80%	20,000	80,000	8,000
False distress communications	80%	20,000	80,000	8,000
Failure to permit inspection	75%	18,750	75,000	7,500
Violations of operator services requirements	75%	n.a.	75,000	7,500
Malicious interference	70%	17,500	70,000	7,000
Failure to respond to Commission communications	70%	17,500	70,000	7,000

[1] The forfeiture ceilings per violation or per day of a continuing violation contained in section 503 of the Communications Act and the Commission's Rules are $100,000 for common carriers or applicants, $25,000 for broadcasters and cable operators or applicants, and $10,000 for all others. 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80. In addition, for continuing violations involving a single act or failure to act, there is an overall limit of $1,000,000 for common carriers or applicants, $250,000 for broadcasters and cable operators or applicants, and $75,000 for all others. Id. The base amounts listed are for a single violation or single day of a continuing violation. Unless Commission authorization is required for the behavior involved, a section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or is not operating in the radio control or citizens band radio services can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

Violation	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Importation or marketing of unauthorized equipment	70%	n.a.	70,000	7,000
Exceeding authorized antenna height	60%	15,000	60,000	6,000
Exceeding power limits	50%	12,500	50,000	5,000
Unauthorized emissions	50%	12,500	50,000	5,000
Using unauthorized frequency	50%	12,500	50,000	5,000
EBS equipment not installed or operational	50%	12,500	n.a.	n.a.
Transmission of indecent/obscene material	50%	12,500	n.a.	5,000
Violation of broadcast EEO rules	50%	12,500	n.a.	n.a.
Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination	50%	12,500	n.a.	n.a.
Unauthorized discontinuance of service	40%	10,000	40,000	4,000
Use of unauthorized equipment	40%	10,000	40,000	4,000
Violation of children's television commercialization or programming requirements	40%	10,000	n.a.	n.a.
Violation of main studio rule	40%	10,000	n.a.	n.a.
Construction or operation at unauthorized location	40%	10,000	40,000	4,000
Failure to engage in required frequency coordination	40%	10,000	40,000	4,000
Failure to file required forms or information	30%	7,500	30,000	3,000
Violation of public file rules	30%	7,500	n.a.	n.a.
Violation of sponsorship ID requirements	25%	6,250	n.a.	n.a.

Violation	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Violation of requirements pertaining to broadcasting of lotteries or contests	25%	6,250	n.a.	n.a.
Violation of technical logs/time brokerage agreements file requirements	20%	5,000	n.a.	n.a.
Broadcasting telephone conversations without authorization	20%	5,000	n.a.	n.a.
Failure to make required measurements or conduct required monitoring	10%	2,500	10,000	1,000
Violation of enhanced underwriting requirements	10%	2,500	n.a.	n.a.
Failure to provide station ID	10%	2,500	10,000	1,000
Unauthorized pro forma transfer of control	10%	2,500	10,000	1,000
Failure to maintain required records	10%	2,500	10,000	1,000
Miscellaneous violations	5%	1,250	5,000	500

II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES

Upward Adjustment Criteria [2]

(1) Egregious misconduct	50-90%
(2) Ability to pay/relative disincentive [3]	50-90%
(3) Intentional violation	50-90%
(4) Substantial harm	40-70%
(5) Prior violations of same or other requirements	40-70%
(6) Substantial economic gain	20-50%
(7) Repeated or continuous violation	varies [4]

Downward Adjustment Criteria

(1) Minor violation [5]	50-90%
(2) Good faith or voluntary disclosure	30-60%
(3) History of overall compliance	20-50%
(4) Inability to pay	varies [6]

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[2] Both upward and downward adjustments are applied to the base forfeiture amount. More than one factor may apply in a given case.

[3] The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D).

[4] The percentage adjustment for this criterion could vary up to the statutory maximum per violation or per day of a continuing violation.

[5] A "minor" violation is misconduct which is at a low level of seriousness within the violation category. A minor violation is the opposite of "egregious misconduct."

[6] As noted above, the Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D). The application of a downward adjustment for inability to pay is based upon a showing of substantial financial hardship. Inability to pay would generally be considered as a downward adjustment factor only upon a specific showing by the entity against whom forfeiture action is taken.

III. NON-SECTION 503 FORFEITURES

Violation		Statutory Amount [7]
Sec. 202(c)	Common carrier discrimination	$6,000 + $300/day
Sec. 203(e)	Common carrier tariffs	$6,000 + $300/day
Sec. 205(b)	Common carrier prescriptions	$12,000
Sec. 214(d)	Common carrier line extensions	$1,200/day
Sec. 219(b)	Common carrier reports	$1,200
Sec. 220(d)	Common carrier records & accounts	$6,000/day
Sec. 223	Dial-a-Porn	$50,000 maximum
Sec. 364/386	Ship radio	$5,000 (owner) $1,000 (master)
Sec. 506	Great Lakes Agreement	$500 (owner) $100 (master)
Sec. 634	Cable EEO	$200

Note: Non-section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for section 503 forfeitures in Section II above.

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[7] Unlike section 503, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. The one exception is section 223 of the Act, which provides a maximum of $50,000. For convenience, the Commission will treat the $50,000 set forth in section 223 as if it were a prescribed base amount, subject to downward adjustments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIAL PAGE, L.P. File No. I-T-D-91-009

Application for authority to close
VHF-FM Maritime Mobile Public Coast
Station KQU377, Walland, Tennessee.

ORDER AND AUTHORIZATION

Adopted: July 26, 1991; Released: August 5, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on April 8, 1991 by Dial Page, L.P. (Dial Page), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM Maritime Mobile Public Coast Station KQU377 located in Walland, Tennessee. The station provides services to vessels in the inland waterway and lakes in the vicinity of Knoxville, Tennessee. The application was placed on public notice on April 24, 1991. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, Dial Page states that traffic has been steadily declining in favor of new technology such as cellular telephone service. Dial Page has very few subscribers left and has been losing money for a fairly long period. For example, between September 1989 and August 1990, Dial Page sustained a $22,154 net operating loss. The revenues it received in December 1990, January and February 1991 are $968.40, $809.05 and $925.00 respectively; and its monthly expenses have been approximately $2,140. It believes that cellular telephone, public mobile services, SSB and satellite communications services are available and being used. Furthermore, distress and safety messages are handled by the U.S. Coast Guard. Therefore, the closing of Station KQU377 will not adversely affect the public convenience and necessity.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KQU377.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-009 IS GRANTED, and Dial Page is authorized to discontinue service via its Maritime Mobile Public Coast Station KQU377 at Walland, Tennessee

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALASCOM, INC. File No. I-T-D-91-008

Application for authority to close Medium Frequency Public Coast Stations at Sitka (WDU29), Juneau (WGG58-Eleven Mile), Cold Bay (WGG53), Cordova (WDU26), Kodiak (WDU23), Ketchikan (WGG56) and Nome (WKR), and Alaska Public Fixed Stations at Cordova (WDU26), Juneau (Eleven Mile- WGG-58), Ketchikan (WGG56), Kodiak (WDU23), all in Alaska

ORDER AND AUTHORIZATION

Adopted: July 26, 1991; Released: August 5, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed by Alascom, Inc. (Alascom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from seven Medium Frequency Public Coast Stations and four Alaska Public Fixed Stations at various locations in Alaska. The application was placed on public notice on April 24, 1991. In the May 29, 1991 letter, the State of Alaska indicates that it has no objections to Alascom's filing.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. The stations Alascom proposes to close are located in Nome, Juneau, Ketchikan, Sitka, Cold Bay, Cordova and Kodiak. Discontinuance is proposed because of a very low traffic volume, the prospect of a significant capital investment to replace the radio equipment and the imminent need to vacate the building which houses the marine radio operators and control equipment. The equipment was installed in 1972. The high powered transmitters are becoming increasingly unreliable and more difficult to repair, especially in light of the fact that critical spare parts are no longer available. In the last three months, November 1990-January 1991, the combined total traffic for all 11 stations was 22 messages with a resultant revenue of $270. Therefore, there was insufficient total revenue to offset even the direct unloaded operator expense alone of $11,781 for the same time period. All the stations which Alascom proposes to close are served by Alascom's 24 hour per day VHF radiotelephone stations already in place. Safety and distress service is provided by the U.S. Coast Guard. The Canadian Coast Guard also provides MF radio coverage along the entire West coast of Canada.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the stations listed.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-008 IS GRANTED, and Alascom is authorized to discontinue service via the stations listed in the Appendix.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

A. Medium Frequency Public Coast Stations in Alaska:

WDU29, Sitka
WCX73 (WGG58), Juneau (Eleven Mile)
WGG53, Cold Bay
WHG862 (WDU23), Kodiak
WCX60 (WDU26), Cordova
WHG807 (WGG56), Ketchikan
WKR, Nome

B. Alaska Public Fixed Stations:

WCX60 (WDU26), Cordova
WCX73 (WGG58), Juneau (Eleven Mile)
WHG807 (WGG56), Ketchikan
WHG862 (WDU23), Kodiak

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

METROMEDIA PAGING SERVICES, INC. File No. I-T-D-91-010

Application for authority to close
Maritime Mobile Public Coast Station
KSK209, Prince Frederick, Maryland.

ORDER AND AUTHORIZATION

Adopted: July 26, 1991; Released: August 5, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on May 10, 1991 by Metromedia Paging Services, Inc. (MPS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Maritime Mobile Public Coast Station KSK209 located in Prince Frederick, Maryland. The station serves the Chesapeak Bay area from Rosehaven to Solomons Island, Maryland. The application was placed on public notice on May 22, 1991. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, MPS states that no calls have been made through the subject station for more than a year due, in large part, to the rapid proliferation of cellular telephones and the change by commercial vessel to dependence on SSB, cellular and satellite communications systems. MPS also states that there is no income to offset losses. According to MPS, users of the station have available to them Marine channel 28 in Cambridge and channel 26 in Point Lookout, Maryland. Safety and distress calls are handled by the Thomas Point Light Coast Guard station located just South of Annapolis.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KSK209.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-010 IS GRANTED, and MPS is authorized to discontinue service via its Maritime Mobile Public Coast Station KSK209 at Prince Frederick, Maryland.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MARY ANN SALVATORIELLO ("Salvatoriello") For a new FM facility in Lebanon, New Hampshire	File No. BPH-880126OM
JOHN BOYD ("Boyd") For a new FM facility in Pueblo, Colorado	File No. BPH-880225NY
HOLLY HILL BROADCASTING CO. ("Holly Hill") For a new FM facility in Holly Hill, Florida	File No. BPH-880505NQ
SUZANNE M. WILSON ("Wilson") For a new FM facility in Wallace, Idaho	File No. BPH-890713MH

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1991; Released: August 1, 1991

By the Commission:

1. In this consolidated proceeding, the Commission will consider three petitions for reconsideration and one application for review from four applicants wishing to construct new FM radio stations.[1] The Mass Media Bureau, acting on delegated authority, found their applications to be fatally defective because, as of the close of the relevant filing windows, each contained an electronically transmitted facsimile of the applicant's signature instead of a handwritten signature. As a result, the Bureau dismissed the applications.[2] In this *Memorandum Opinion and Order*, we examine the signature and tenderability requirements for commercial FM applications and, for the reasons discussed below, affirm the Bureau's actions.

BACKGROUND

2. The Bureau examined each of the subject applications under the "hard look" approach: strict processing procedures that have applied to all applications for commercial FM facilities since 1985. *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*Hard Look Order*), *recon. denied*, 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without published opinion sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).[3] The Commission adopted the "hard look" approach in an effort to reduce the large number of carelessly prepared, abusive, and speculative FM applications that it had been receiving. *Hard Look Order*, 50 Fed. Reg. at 19940. Such applications were often incomplete, and the Commission's previous policy of accepting amendments to correct defects in vital processing information resulted in significant delays to all FM applicants, including those that complied fully with our requirements. *Id.* The delays associated with our acceptance of flawed applications not only unfairly delayed processing of problem-free applications, but also burdened our processing staff and impeded initiation of new FM service. *See Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *James C. Rogers III*, 2 FCC Rcd 5536, 5537 (1987). In view of an expected influx of thousands of applications for newly available FM channels, the Commission determined that a stricter standard for evaluating FM applications was necessary.[4]

3. In adopting the "hard look" approach, the Commission put potential applicants on notice that certain portions of commercial FM applications, identified and discussed in Appendix D to the *Hard Look Order*, are crucial for tenderability (that is, substantial completeness) and that applications without this information at the close of the filing window would be dismissed without an opportunity to amend. The *Hard Look Order* noted that the applicant's signature would be one of the items crucial to tenderability of commercial FM applications. *Hard Look Order*, Appendix D, 50 Fed. Reg. at 19946. The Bureau, relying on the *Hard Look Order* read in conjunction with the signature requirements in Section 73.3513 of our Rules, found that the absence of original signatures on commercial FM applications are tenderability defects and, as such, cannot be corrected after close of the filing window.

DISCUSSION

4. The four applicants challenging the Bureau's decision maintain that applications with facsimile signatures are complete or substantially complete as filed. They believe that the Bureau, at a minimum, should have permitted them to amend their applications with handwritten signatures at a later date and ask the Commission to reinstate their applications *nunc pro tunc* so that they can compete in the comparative hearing process. Parties whose applications are mutually exclusive with the subject applications, however, argue that a facsimile signature on a commercial FM application is tantamount to no signature at all and constitutes a fatal defect that cannot be corrected by a post-filing window amendment.[5]

5. Our determination of whether to reinstate the subject applications depends upon the resolution of three issues: (1) Whether applications with signatures transmitted electronically via facsimile machine satisfy the Commission's requirements for signed applications; (2) If not, whether commercial FM applications with facsimile signatures can be amended with handwritten signatures after close of the relevant filing window; and (3) Whether the Commission's tenderability standards with respect to signature are of sufficient clarity to put the public on notice of these requirements.

Signature Requirements

6. Section 73.3513 of the Commission's rules requires that broadcast "applications, amendments thereto, and related statements of fact required by the FCC must be signed."[6] 47 C.F.R. § 73.3513(a). The rule goes on to state that "only the original applications, amendments, or re-

lated statements of fact need be signed; copies may be conformed."[7] 47 C.F.R. § 73.3513(c). Thus, an original application must contain an original signature but it is sufficient for copies of the application to contain something similar to a signature. The original signature requirement provides assurance that the applicant has personally reviewed the application and can be held responsible for the truthfulness and accuracy of the statements therein. *See B. J. Hart*, 20 RR 301 (1960).[8]

7. Two of the applicants herein argue that applications with facsimile signatures are signed originals for the purpose of Section 73.3513. According to Wilson and Salvatoriello, the only difference between a facsimile signature and a handwritten signature is the means of delivery. *Wilson Application for Review* at 12; *Salvatoriello Reply* at 2. Salvatoriello, for example, characterizes her application as containing an "electronically-transmitted original signature." *Salvatoriello Reply* at 2.[9]

8. Upon review of the applicants' submissions, and the oppositions thereto, we conclude that a signature transmitted via a facsimile machine is not an original signature for the purpose of our rules. Section 73.3513, which embodies our signature requirements for broadcast applications, distinguishes originals from copies. 47 C.F.R. § 73.3513(a) and (c). Facsimile (telecopier) machines are essentially copiers connected to telephone lines. When an applicant uses this technology, its original, personally executed, signature remains at the site of transmission. The image produced on the receiving end is a copy that does not satisfy the requirement of an original.[10] Thus, an application containing only an electronically produced copy of a signature is defective and cannot be granted. *Cf. Jane A. Roberts*, 29 FCC 141 (1960) (applications with signature defects insufficient for grant without amendment).[11]

Ability to Amend

9. Having determined that facsimile signatures are defects, we now must consider whether they are fatal errors or can be corrected with post-filing window amendments. All of the applicants herein attempted to amend their applications with original handwritten signatures shortly after close of the filing window. The Bureau rejected these amendments, however. The Bureau's actions were based on the *Hard Look Order*, which states:

> Because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender. . . . If the application is returned during the initial check as not sufficient for tender we will not permit the applicant to remedy the defect.

Hard Look Order, Appendix D, 50 Fed. Reg. at 19946.

10. The applicants argue that the *Hard Look Order* identifies as untenderable only those applications that are "unsigned," which the applicants define as those in which a signature or a copy of a signature is completely missing. They maintain that applications with facsimile signatures are not unsigned because facsimile signatures, like handwritten signatures but unlike no signature at all, provide a reasonable assurance that the applicant has reviewed the application and can be prosecuted for any false statements. *See Boyd Petition* at 2; *Wilson Application for Review* at 5; *Holly Hill Petition* at 7; *Salvatoriello Reply* at 4. The applicants argue that cases permitting amendment of defective signatures in broadcast services other than FM confirm that applications with facsimile signatures are substantially complete.[12]

11. The "hard look" tenderability standards apply only to commercial FM applications. Other broadcast services, such as AM and TV, have less stringent standards for tender and amendment due to the significantly smaller volume of applications in those services.[13] *See Hard Look Order*, 50 Fed. Reg. at 19937 (rejecting original proposal to include TV applications in the "hard look" approach). In the present proceeding, which turns on compliance with the FM "hard look" criteria, AM and TV tenderability decisions are unpersuasive. We will look, instead, to the language of the *Hard Look Order* and to cases based on that *Order*.[14]

12. The *Hard Look Order* establishes a two pronged approach for examining tenderability defects. Under the first prong, we determine if information necessary for tenderability is missing. If so, the application is dismissed without further consideration. *See Hard Look Order*, Appendix D, 50 Fed. Reg. at 19946. Applying this procedure, the Bureau regarded applications without original signatures as missing the signatures, and therefore untenderable. We agree with the Bureau's approach. For a document to be considered "signed" it must contain an original signature. Unless the Commission explicitly authorizes an alternative to the filing of an original signature, in a manner that satisfies the requirements of the Communications Act[15], an application without an original signature is "unsigned." As we said in our only case to date construing the "hard look" signature requirement, unsigned commercial FM applications are not acceptable for tender and cannot be amended after close of the filing window. *See Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989). In the cellular radio service, which also has strict processing guidelines, we have similarly strictly enforced our signature requirements. *See Ronald F. Trinchitella*, 4 FCC Rcd 6360 (1989), *aff'd by judgment*, No. 89-1520 (D.C. Cir. May 18, 1990) (per curiam).

13. Having found the subject applications defective under the first prong of the *Hard Look Order*, the Commission would not ordinarily examine the applications under the second prong. However, in view of the applicants' position that their applications were signed but contained minor signature defects, we believe that a discussion of the second prong of the "hard look" approach would be useful. The second prong establishes the following guidelines for considering applications with tenderability information that is present but visibly incorrect:

> If the needed information can be derived or the inconsistency resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender . . . [and] we will not permit the applicant to remedy the defect.

Hard Look Order, Appendix D, 50 Fed. Reg. at 19946. This approach recognizes that, unless the Commission can obtain each essential piece of information from the face of the application itself, we would be unable to process the thousands of commercial FM applications received, with a reasonable speed of service, within our limited staff resources.

14. In a separate proceeding, the Bureau found an FM application signed in two of the three required places to be substantially complete under the second prong of the "hard look" approach. *Josephine M. Rodriguez d/b/ a Cielo Communications*, 3 FCC Rcd 6752 (MMB 1988). In that case, the Bureau concluded that the needed signature information could be derived within the confines of the application because the language of the defective unsigned certification was essentially the same as one for which the applicant supplied an original signature. *Id.* In contrast, applications containing only facsimiles of the applicants' signatures do not permit the Commission's staff to be reasonably certain, on the face of the application submitted, that the applicants have reviewed the applications and verified their accuracy. A copy of a signature does not, for example, provide a reasonable assurance that the signature on the original application was affixed personally by the applicant and was not a stamp or photocopy affixed by someone else.[16]

15. If FM applications with copies of signatures were acceptable for tender, our staff could not be certain of the validity of the signature upon receipt, but rather would have to await amendment, examine the original signature, and compare the amended original with the initial facsimile filing. This comparison not only goes beyond the boundaries of the application filed within the window, but also adds another step to our processing procedures. In sum, it is just the type of time consuming administrative burden that the Commission sought to eliminate by establishing the "hard look" procedures. Moreover, imposition of sanctions for false certifications would be problematic at best with only facsimiles of an applicant's signature.[17] Accordingly, we find that even under the less stringent second prong of the "hard look" approach, the applicant's facsimile signatures would render the applications insufficient for tender and, therefore, uncorrectable by a post-filing window amendment.

Clarity of Tenderability Standards

16. When an agency establishes standards for applications, elementary fairness requires that the standards be clear enough to apprise potential applicants of what is expected. *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976). The less forgiving the standards, the more precisely stated they must be. *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). The applicants argue that the Commission has promulgated an unforgiving tenderability standard without giving sufficient notice that facsimile signatures are tenderability defects. They state, for example, that the unacceptability of facsimile signatures on FM applications cannot be reasonably understood without an express prohibition similar to that which exists in two nonbroadcast services.[18]

17. We reject the applicants' arguments. The *Hard Look Order*, which was published in its entirety in the *Federal Register*, explicitly identifies signature as a requirement for tender and explains the reason for this requirement. There was no need for the *Hard Look Order* to expound on the form of the signature required because this was already clear in the Commission's broadcast rules. *See* 47 C.F.R. § 73.3513(c). The instructions for the application form which each applicant completed repeat the requirement of an original signature and refer applicants to the appropriate section of our rules. *Cf. Malkan FM Associates v. FCC*, No. 90-1281, slip op. at 12 (D.C. Cir. June 14, 1991). The even more explicit manner in which the Commission chose to prohibit facsimile signatures in two nonbroadcast services does not negate the clear requirements that exist for the FM service.

18. The clarity of the Commission's signature requirements also is evident from the overwhelming percentage of applicants who understand and comply with these requirements. Of the many thousands of commercial FM applications received under the "hard look" procedures, only a handful of applicants submitted facsimile signatures.[19] Furthermore, we have received two rule making petitions recognizing that facsimile signatures are not acceptable on applications and asking that we change these rules.[20] In sum, the Commission's requirement of original signatures on original applications is clear and well understood by the public as a prerequisite for tender. An applicant who either ignores or fails to understand this clear and valid requirement assumes the risk that its application will not be accepted. *See Ranger v. FCC*, 294 F.2d 240, 242 (D.C. Cir. 1961).

Salvatoriello Estoppel and Waiver Issues

19. Salvatoriello argues that, notwithstanding our conclusions above, exceptional circumstances surrounding her application warrant special consideration. The filing window relevant to the Salvatoriello application closed on January 26, 1988. One day prior to close of the window, Salvatoriello signed her applications in Lebanon, New Hampshire and gave them to an overnight courier. She then embarked on a planned vacation outside of the United States. Subsequently, a snowstorm hit the area and closed the local airport, preventing the courier from delivering Salvatoriello's application to Washington.

20. At approximately 11:00 a.m. on the the last day for filing, Salvatoriello's counsel learned that the applications had not left New Hampshire. Counsel placed a phone call to the then acting Secretary of the Commission. Counsel states that, on the advice of the acting Secretary that facsimile filing was permitted under Section 1.52 of the Commission's rules, counsel faxed the application to Washington for delivery to the Commission before the close of business. *Salvatoriello Petition* at 5. Salvatoriello argues that: (1) Section 1.52 permits facsimile signatures on applications; (2) the Commission is estopped from interpreting Section 1.52 otherwise; and (3) the circumstances surrounding her application warrant a waiver.[21]

21. It is clear from the face of Section 1.52 of our rules, 47 C.F.R. § 1.52, that the rule section permits *attorneys and applicants not represented by counsel* to include facsimile signatures on *pleadings*, and does not permit *applicants represented by counsel* to include facsimile signatures on original *applications*. Section 1.52 of our rules is included under the heading of rules applicable to "Pleadings, Briefs, and Other Papers." Persons referring to this portion of our rules are advised that rules governing applications are contained in other sections of our rules, which are cross-referenced. *See* 47 C.F.R. § 1.42.

22. Despite the clear language of Section 1.52, Salvatoriello would have us interpret the rule differently for her because she allegedly received incorrect advice

from a Commission employee. Salvatoriello's argument is based on the doctrine of estoppel, an equitable remedy that protects parties who act on representations made by others presumed to have knowledge. Neither the United States Supreme Court nor the Court of Appeals for the D.C. Circuit, have ever found estoppel applicable to the Federal Government. It is clear, however, that a party asserting estoppel against the Government certainly cannot succeed without making a showing that goes beyond that ordinarily sufficient to warrant estoppel against a private party.[22] *Office of Personnel Management v. Richmond*, _____ U.S. _____; 110 S. Ct. 2465 (1990). Erroneous advice received from a government employee is insufficient to provide this additional showing, particularly when the relief requested would be contrary to an applicable statute or rule. *Id.*; *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981). Because the relief requested would be contrary to the clear requirements of our rules, Salvatoriello has not made a sufficient showing for estoppel. A person relying on informal advice given by Commission staff does so at their own risk. *See Texas Media Group, Inc.*, 5 FCC Rcd 2851, 2852 (1990); *aff'd sub nom. Malkan FM Associates v. FCC*, No. 90-1281, slip op. at 12 (D.C. Cir. June 14, 1991).

23. Salvatoriello also fails to demonstrate circumstances warranting a waiver of the Commission's rules. *See generally WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). To justify a waiver of an application filing deadline, the applicant must demonstrate a calamity of such a widespread nature that even the best of planning could not have avoided the late filing. The Commission does not generally grant waivers based on inclement weather or failures of third-party couriers because "although these circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays." *Public Notice, FCC Overrules Caldwell Television Associates, Ltd.*, FCC 85-534, 58 RR 2d 1706, 1707 (1985). *See Sierra-Shingle Springs Broadcasting*, 3 FCC Rcd 1677 (1988), *recon. denied sub nom. Tours Broadcasting Co.*, 5 FCC Rcd 1039 (1990). Here, where a snowstorm was reasonably foreseeable and did not stop all forms of transportation[23], we cannot find that the lateness of Salvatoriello's original signatures was attributable to circumstances completely beyond her control. *See Kennebec Valley Television, Inc.*, 3 FCC Rcd 4522, 4524 (1988). Nor does Salvatoriello's absence from the United States justify a waiver. Our rules already give applicants who are outside of the country or physically disabled additional leeway by permitting their attorneys to sign their applications. 47 C.F.R. § 73.3513(b). The facts of this case do not justify additional relief in the form of a waiver of the original signature requirement, either for the applicant or for the applicant's attorney. The Commission has long admonished potential applicants that: "While an applicant is free to choose when it will file its application, if it withholds the filing of an application until a late date, it must be held to do so at its own peril." *Upshur County Broadcasting Co.*, 19 RR 21, 24 (1959).

CONCLUSION AND ORDERING CLAUSES

24. As discussed above, we find that the four applicants in this proceeding filed applications containing signature defects that made their applications unacceptable for tender. Under the clear requirements of the Commission's "hard look" policy for FM applications, this rendered the applications unamendable after the close of the relevant filing windows.

25. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by Mary Ann Salvatoriello, John Boyd, and Holly Hill Broadcasting Company, and the Application for Review filed by Suzanne M. Wilson ARE DENIED.

26. IT IS FURTHER ORDERED that the Requests for Expedited Review filed by Mary Ann Salvatoriello and Holly Hill Broadcasting Company ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Salvatoriello, Boyd, and Holly Hill submitted Petitions for Reconsideration on April 12, 1990, October 12, 1990, and March 4, 1991 respectively (*Salvatoriello Petition*, *Boyd Petition*, and *Holly Hill Petition*). Wilson filed an Application for Review on March 15, 1991. (*Wilson Application for Review*).

[2] *See* Hearing Designation Orders in *Radio South Burlington, Inc.*, 5 FCC Rcd 1688 (1990) (dismissing Salvatoriello); *SBM Communications, Inc.*, 5 FCC Rcd 5503 (1990) (dismissing Boyd); *Central Florida Communications Group, Inc.*, 6 FCC Rcd 522 (1991) (dismissing Holly Hill); *Sam Widge Advertising Limited Partnership*, 6 FCC Rcd 882 (1991) (dismissing Wilson).

[3] The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985).

[4] *See Hard Look Order*, 50 Fed. Reg. at 19938. The "hard look" processing system has in large measure accomplished its intended result. By May 1, 1991, the staff had used the "hard look" approach to process approximately 7050 construction permit applications. Our FM processing staff currently returns as defective approximately 5% of the applications tendered, as compared with 40% returned before the "hard look" approach.

[5] *See* Opposition of Maxine W. Snow, MM Docket No. 90-73 (April 25, 1990); Opposition of Pueblo Broadcasting, Inc., MM Docket No. 90-381 (October 22, 1990); Joint Opposition of HB Broadcasting, Inc., Holly Hill Radio Partners, and Walo Broadcasting Limited Partnership, MM Docket No. 90-633 (March 18, 1991). Salvatoriello, Boyd, and Holly Hill filed Replies to the Oppositions in their dockets on May 7, 1990, October 31, 1990, and March 25, 1991 respectively. Holly Hill and Salvatoriello, on March 26, 1991 and April 12, 1990 respectively, filed requests for expedited review which are moot as a result of today's decision.

[6] This rule was adopted under the authority of Sections 308(b) and 319(a) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 308(b) and 319(a), which mandate that applications for licenses and broadcast construction permits must be "signed by the applicant." The Communications Act's signature requirement can be traced back to the Radio Act of 1927. *See Report No. 632*, H.R. 9971, 69th Congress, Section 21 (1927).

[7] Black's Law Dictionary defines "conformed copy" as "an exact copy of a document on which has been written explanations of things that could not or were not copied; *e.g.* written signature might be replaced on conformed copy with notation that it was signed by the person whose signature appears on the original." *Black's Law Dictionary* at 271-72 (rev. 5th ed. 1979). Our rules have provided for copies to be conformed instead of signed since at least 1946. *See* Former Section 1.303 of the Commission's Rules, *published at* 11 Fed. Reg. 177A-393, 177A-409 (September 11, 1946).

[8] We note that in *B. J. Hart* the Commission accepted *nunc pro tunc* an amended application with an original signature, but under different processing rules than those at issue here.

[9] Relying on this theory, several applicants argue that their certifications were timely because they were signed before the close of the filing window. Clearly, the Commission looks to the date of receipt, not to the date of signature, to determine if an application is timely filed. *Cf.* 47 C.F.R. § 0.401(b).

[10] *Accord City Cellular Telephone Co., slip op.* Mimeo No. 436 (CCB May 2, 1986) (photocopy signatures rejected). *Compare Community Service Broadcasters, Inc.*, 22 RR 658 (1961) (rubber-stamped name sufficient as signature if made personally in the presence of a notary who attests to that effect on the face of the application).

[11] As in *B. J. Hart*, note 8, *supra*, the Commission permitted amendment but under different processing rules.

[12] *See, e.g., Communications of Gaithersburg, Inc.*, 60 FCC 2d 537, 542 (1976) (allowing applicant to submit a corrected signature to amend AM application signed by person not qualified to sign under the Commisssion's rules); *Peach State Broadcasting, Ltd.*, 2 FCC Rcd 3288 (MMB 1987) (allowing TV applicant to amend facsimile signature with original signature).

[13] It is well established that the Commission can apply different standards to different broadcast services when there is a rational basis for the distinction. *See North Texas Media, Inc. v. FCC*, 778 F.2d 28, 34 (D.C. Cir. 1985). Contrary to the arguments of the applicants, the Commission is not treating similarly situated applicants inconsistently. *See generally Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

[14] The applicants cite to only two FM cases as support for their position. We discuss one of these cases *infra* at para 13. The second case, *Susan E. Turgetto*, 5 FCC Rcd 341 (MMB 1990), is inapposite. *Turgetto* involved a facsimile of an FCC form, not of the signatures on the form, when applicants had been explicitly directed by the Commission to use copies during a form shortage.

[15] For example, the Commission has on several occasions explicitly provided for electronic filing of specific types of documents when there are safeguards in place for verifying that the original document contains original signatures. *See* 47 C.F.R. § 1.52 (attorney or unrepresented party must maintain original signature on pleading until document no longer subject to judicial review); Statement of Understanding Between Andrew S. Fishel, Managing Director, FCC, and Robert E. Tall, Executive Director, APCO (August 3, 1990) (electronic filing permitted on a trial basis in the private land mobile radio services when Congressionally authorized frequency coordinator first verifies original signatures on applications).

[16] The requirement of an original signature can prevent or detect photocopy insertion, erasures, and other means of forgery that could otherwise go undetected. Due to the valuable nature of broadcast licenses, the potential for abuse of our application process through bogus signatures is quite real. *See, e.g., Order*, MM Docket No. 88-374, 3 FCC Rcd 4740 (1988), *recon. denied*, 4 FCC Rcd 1568 (1989), *referred to Department of Justice*, Letter from Dennis R. Patrick, Chairman, FCC to Honorable Edward S.G. Dennis, Jr., Assistant Attorney General (August 4, 1989) (forged and fictitious signatures filed by Dr. Bernard Boozer). In the event of an alleged forgery, information obtainable only from an original, such as type of ink or pressure of the pen, may become relevant to determining whether challenged signatures are authentic.

[17] An original signature can be important for criminal prosecution of applicants, under 18 U.S.C. § 1001, for false statements made on Commission applications. Under the Federal Rules of Evidence and the "best evidence rule," originals are the preferred form of evidence. *See Fed. Rules of Evidence* § 1002; 4 Wigmore, Evidence § 1186 (Chadbourn rev. 1972). Although the Federal Rules of Evidence also will permit a "duplicate" to be admitted into evidence, the Rules define "duplicate" as a counterpart that "accurately reproduces the original." *Fed. Rules of Evidence* § 1001(4). Many facsimile machines ,provide less than accurate clarity and, therefore, copies of signatures produced by these machines may be of insufficient quality to be admissible as "duplicates." Furthermore, duplicates are admissible only if no genuine question is raised as to the authenticity of the original, and admission of the duplicate would not be unfair under the circumstances. *Fed. Rules of Evidence* § 1003. Accordingly, facsimile signatures might prevent or impede prosecution of applicants for false statements, by creating in every such case a potential issue as to the authenticity of documents filed with the Commission.

[18] *See* 47 C.F.R. § 5.53(f) (experimental radio service); *Public Notice*, SMR Filing Window, 2 FCC Rcd 80 (1986) (private radio service).

[19] Of the over 7000 applications processed under the *Hard Look Order*, the Commission knows of only six applications in which facsimile signature is an issue. This includes the four in the present case and two pending before the Commission's Administrative Law Judges (Irene Rodriguez de McComas, MM Docket No. 90-380, File No. BPH-880816OR; Homewood Community Broadcasting, Ltd., MM Docket No. 90-638, File No. BPH-880816OQ). *Compare Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (lack of clarity supported by fact that 44 of 53 applicants misunderstood the requirements).

[20] *See* Lauren A. Colby, *Petition for Rule Making*, (filed April 18, 1988); Arthur W. Brothers, *Petition for Rule Making*, (filed December 27, 1990). In dismissing both petitions, the Bureau stated that the original signature requirement is not unduly burdensome and that facsimile signatures on applications may undermine the goal of the Communications Act to ensure accountability on the part of license applicants. *See* Letter from Alex D. Felker, Chief, Mass Media Bureau to Lauren A. Colby (July 25, 1989); Letter from Roy J. Stewart, Chief, Mass Media Bureau to Arthur W. Brothers (April 24, 1991).

[21] Salvatoriello also argues that she received disparate treatment because an application mutually exclusive with her own was accepted for tender despite a defect in the address. We reject this argument. The mutually exclusive application was defective only in the sense that it incorrectly contained a post office box address instead of a residence address. The defective address was amendable under the second prong of the *Hard Look Order*, however, because the incorrect information still enabled the Commission to communicate with the applicant. In contrast, Salvatoriello's signature defect did not satisfy either prong of the *Hard Look Order*. *See* paras. 11-13 *supra*.

[22] The U.S. Supreme Court, in *dicta*, indicated that deliberate misconduct might provide this additional showing. *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam). Salvatoriello, however, has not shown any deliberate misconduct by the Commission or its staff. In fact, it is not clear from the record whether counsel

explained to our staff that Salvatoriello was filing an application rather than a pleading or that the matter involved the FM service.

[23] The applicant argues that, had it not relied on the advice of staff, it could have chartered a plane or used a commercial airline to fly the application to Washington. *Salvatoriello Petition* at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 31, 1991

COMMENTS INVITED ON ILLINOIS REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Illinois (Region 13).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties may file comments on or before **September 6, 1991,** and reply comments on or before **September 23, 1991.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 13 consists of the State of Illinois, except for the following counties: Winnebago, McHenry, Cook, Kane, Kendall, Grundy, Boone, Lake, DuPage, DeKalb, Will and Kankakee Counties. (See Memorandum Opinion and Order, General Docket No. 87-112, 3 FCC Rcd 2113 (1988).)

Comments should be clearly identified as submissions to **PR Docket 91-228 Illinois - Region 13,** and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Betty Woolford Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-209

In re Applications of

CARMEN DIAZ (hereafter "Diaz") — File No. BPH-900122MT

RAMONA BROADCASTING COMPANY (hereafter "Ramona") — File No. BPH-900122MW

ANN MCCULLOM AND DUANE DAVIS D/B/A SUN CITY BROADCASTERS — File No. BPH-900122NB

DENNIS L. MARTIN (hereafter "Martin") — File No. BPH-900122ND

SUN CITY WIRELESS, LTD., L.P. (hereafter "Wireless") — File No. BPH-900122NG

SUN CITY COMMUNICATIONS, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "SCC") — File No. BPH-900122NK

SUN CITY COMMUNICATIONS, INC. (hereafter "Communications") — File No. BPH-900122NO

MOLEZION COMMUNICATIONS, INC. (hereafter "Molezion") — File No. BPH-900122NP

VINEYARD COMMUNICATIONS, INC. ("hereafter "Vineyard") — File No. BPH-900122NV

SUN CITY BROADCASTING CO., LIMITED PARTNERSHIP (hereafter "SCBC") — File No. BPH-900122NE (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
on Channel 225A in
Sun City, California

HEARING DESIGNATION ORDER

Adopted: June 29, 1991; Released: August 6, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *SCBC*. Section II, Item 11 of FCC Form 301 (June 1989) requires an applicant to certify whether it is in violation of 47 U.S.C. § 310(b). Section 310(b) prohibits the grant of an application to a corporation in which any officer or director is an alien. Although the language of Section 310(b) specifically refers to corporations, the alien ownership restrictions are also applicable to limited partnerships like SCBC's and other non-corporate entities and associations. *See e.g. Wilner & Scheiner*, 103 FCC 2d 511 (1985); *Prime Media Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *Continental Cellular*, 5 FCC Rcd 691 (1990). SCBC has responded to Item 11 in the affirmative. In an accompanying exhibit, SCBC further states that Mari-Lou Lerma-Silva ("Lerma-Silva"), its general partner, is a citizen of the Republic of the Philippines but has filed for U.S. citizenship. On August 3, 1991, SCC filed a petition to dismiss the application of SCBC for this reason.

3. To aid in the orderly processing of commercial FM applications, the Commission's Rules provide that applications such as SCBC must be filed before the close of the specified window filing period. For a period of 30 days following the Commission's public notice announcing the acceptance of the applications for tender, minor amendments may be filed as a matter of right to cure acceptability or grantability defects. Thereafter, applications which are determined to be patently defective, and thus unacceptable for filing, are not entitled to comparative consideration with other applications that are not defective and substantially complete. 47 C.F.R. §§ 73.3522 and 73.3566. SCBC's application is patently defective because on the last date for filing amendments as of right, Lerma-Silva was an alien. The remaining applicants, whose applications were not patently defective, are entitled as of the amendment of right date to participate in a hearing without the burden of competing with others that are not, and may never be qualified. Accordingly, SCBC's application will be dismissed and SCC's petition to deny will be granted to the extent indicated.

4. *RF Radiation*. Each of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that seven of the nine surviving applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section

1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Diaz, Ramona, Wireless, SCC, Communications, Molezion and Vineyard failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Diaz, Ramona, Wireless, SCC, Communications, Molezion, and Vineyard will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

5. *U.S.-Mexican Agreement.* An engineering study of Ramona's and Wireless' proposed facilities reveals that the proposals are in violation of the U.S.-Mexican Agreement. Specifically, Ramona's proposed effective radiated power (ERP) of 1.1 kilowatts (kW) and antenna height above average terrain (HAAT) of 151 meters exceed the maximum facilities specified in Annex IV of the U.S.-Mexican Agreement of 1972 for Class A facilities. Wireless amended its application on May 30, 1991, changing its transmitter location due to a loss of the initial proposed site. Although it was filed after the last date for filing amendments as of right, it was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a), and thus, it is accepted for filing. Wireless' amended effective radiated power (ERP) of 1.4 kilowatts (kW) and antenna height above average terrain (HAAT) of 135 meters exceed the maximum facilities specified in Annex IV of the U.S.-Mexican Agreement of 1972 for Class A facilities. In order for both of the proposals to comply with the ERP/HAAT equivalence of 3 kW/91 meters, Ramona's ERP should be lowered to 0.94 kW and Wireless's ERP should be lowered to 1.15 kW. In these cases, the discrepancies are neither tenderability nor acceptability defects insofar as the minimal nature of the defects appear attributable to the imprecision inherent in manually ascertaining from the curves in Annex IV the appropriate ERP/HAAT combination corresponding to the maximum Class A facilities allowed under the U.S.-Mexican Agreement. Therefore, these discrepancies may be resolved by an amendment. On August 3, 1990, SCC filed a petition to deny Ramona's application. In light of the above, the petition to deny filed by SCC will be dismissed. Accordingly, Ramona and Wireless will be required to file amendments to bring their applications in compliance with the U.S.-Mexican Agreement within 30 days of the release of this Order with the presiding Administrative Law Judge.

6. *SCC.* On August 6, 1990, SCC filed a petition for leave to amend to change its transmitter location and overall height above ground. SCC stated that the changes were needed because "local land use fall-safe regulations will require that its tower be constructed at least the distance of its height from the nearest boundary of its site." This is SCC's reason that good cause exists for acceptance of the instant amendment which was filed after the last date for filing amendments as of right. However, the amendment will be returned because it does not meet the good cause requirement of 47 C.F.R. § 73.3522(a)(6) and a site availability issue will be specified.

7. *Communications.* On August 3, 1990, SCC filed a petition to deny Communication's application. SCC asserts that Communications is not in compliance with the city coverage requirement of 47 C.F.R. § 73.315 of the Commission's Rules. The applicant states that the proposed 70 dBu contour covers 59.6 percent of the land area of Sun City, California; however, by adding the population of enumeration districts which lie within the 70 dBu contour, 86 percent of the residential area of Sun City would receive the 70 dBu coverage. Our engineering study supports Communications claim. Accordingly, substantial compliance has been achieved. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). The petition to deny filed by SCC will be denied.

8. *Molezion.* Section III, Item 3 of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Molezion has not provided a contact person as requested in Item 3. Accordingly, Molezion must file an amendment which gives all the information required by Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

9. *Other Matters.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Diaz, Ramona, Wireless, SCC and Vineyard have filed such statements, they are deficient. Diaz has not listed a women's or hispanic group. Ramona, Wireless, SCC and Vineyard have not listed a hispanic organization. Hispanics make up 17.4% of the labor force. Accordingly, the above named applicants will be required to file amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Martin	January 28, 1991
Wireless	April 17, 1991
Molezion	June 14, 1990; March 14, 1991

11. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Wireless and SCC have not completed Item 6 correctly. SCC's application gives a post office box number as the residence address for Menifee Valley Communications, Inc. which is the general partner. In addition Marsha Kato-Waldroff is listed in the table as president, director and shareholder. It is not clear from the table the relationship of Marsha Kato-Waldroff to the limited partnership. Additionally, Wireless gives a post office box number as the residence address for Claude C. Turner, Vincent J. Bartalotta, Jr., John F. McGuire, Jr., and Michael D. Padilla. Accordingly, Wireless and SCC must submit amendments which give all the information required by Section II, Item 6, and SCC's amendment must clarify the relationship of Marsha Kato-Waldroff to the limited partnership.

12. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Ramona, Diaz, Wireless, SCC, Communications, Molezion and Vineyard in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether SCC has reasonable assurance of an available transmitter site.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That SCBC's application IS DISMISSED and the petition to deny filed by SCC will be granted to the extent indicated.

16. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Diaz, Ramona, Wireless, SCC, Communications, Molezion and Vineyard shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

17. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Ramona and Wireless shall submit amendments to bring their applications into compliance with the U.S.-Mexican Agreement to the presiding Administrative Law Judge within 30 days after the release of this Order.

18. IT IS FURTHER ORDERED, That the August 6, 1990 amendment filed by SCC is returned.

19. IT IS FURTHER ORDERED, That the petitions to deny filed by SCC against Ramona and Communication's applications ARE DENIED.

20. IT IS FURTHER ORDERED, That Molezion shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Diaz, Ramona, Wireless, SCC and Vineyard shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

22. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Wireless, Martin and Molezion ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

23. IT IS FURTHER ORDERED, That Wireless and SCC shall submit amendments which contain the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-208

In re Applications of

ATLANTIC RADIO COMMUNICATIONS, INC. (Hereafter "Atlantic") File No. BPH-900116MS

GREAT AMERICAN COMMUNICATIONS CORP. (Hereafter "Great American") File No. BPH-900117MN

COASTAL BROADCASTING SYSTEMS, INC. (Hereafter "Coastal") File No. BPH-900117MO

JOHN SENIOR BROADCASTING CORP. (Hereafter "John Senior") File No. BPH-900117MP

JERSEY DEVIL BROADCASTING COMPANY (Hereafter "Jersey Devil") File No. BPH-900117MT

SEAIRA, INC. (Hereafter "Seaira") File No. BPH-900117MU

SOUTHERN OCEAN BROADCASTING COMPANY (Hereafter "Southern Ocean") File No. BPH-900117MX

LD BROADCASTING LIMITED PARTNERSHIP (Hereafter "LD") File No. BPH-900117NA

GREAT SCOTT BROADCASTING (Hereafter "Great Scott") File No. BPH-900117ML [Dismissed Herein]

SAGE BROADCASTING CORPORATION OF NEW JERSEY (Hereafter "Sage") File No. BPH-900117MM [Dismissed Herein]

JERSEY SHORE BROADCASTING CORPORATION (Hereafter "Jersey Shore") File No. BPH-900117MY [Dismissed Herein]

PRESS BROADCASTING COMPANY (Hereafter "Press") File No. BPH-900117NC [Dismissed Herein]

For Construction Permit
for a New FM Station on Channel 289B1
in Manahawkin, New Jersey

HEARING DESIGNATION ORDER

Adopted: June 28, 1991; Released: August 6, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters. Great Scott.* An engineering study of the application of Great Scott reveals that there is a discrepancy in the calculation of the HAAT. Specifically, the HAAT as listed in Section V-B, Item 7(b)(3) of the application is 100 meters. However, the HAAT as calculated by averaging the eight radials given in Section V-B, Question 19 is 101.9 meters. The effective radiated power (ERP) value of 25 kilowatts in combination with the HAAT value of 101.9 meters would exceed the maximum limitation imposed on Class B1 facilities (25kw/100m) pursuant to 47 C.F.R. §73.211.

47 C.F.R. §73.211(b)(ii) clearly states:

> If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 6 kw ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 28 km in both cases."

In light of the above discrepancy, Great Scott's application must be returned as inadvertently accepted for filing.

3. *Sage.* 47 C.F.R. § 73.3555, the Commission's multiple ownership rule, prohibits the filing of applications "by or on behalf of or for the benefit of the same applicant" when grant of such applications would result in "such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in ... more than twelve (12) stations in the same service which are not minority-controlled." Applications filed in violation of this rule are considered to be inconsistent applications as set forth in 47 C.F.R. § 73.3518. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987). Moreover, the Commission in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19940 (1985) expressed its concern with respect to multiple applications which would be processed under its new "hard look" standards. The Commission stated:

> As an additional component of our "hard-look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications many of which could not be granted under our

> multiple ownership rules." *Storer Broadcasting Co.*, 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.3555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing. In this regard, we note that stations in which the applicant currently holds a cognizable ownership interest would be taken into account in determining the maximum number of acceptable applications.

Legal analysis reveals that, at the time of filing, Sage's application violated the inconsistent application and multiple ownership provisions of 47 C.F.R. §§ 73.3518 and 37.3555(d)(1)(ii) in that Sage had a cognizable interest in more than 12 FM stations. Accordingly, Sage's application must be dismissed.

4. *Jersey Shore.* Jersey Shore simultaneously filed, on the same day, both the instant application for Channel 289B1 Manahawkin, New Jersey (BPH-900117MY) and an application for a construction permit for a new FM station on Channel 259A at Tuckerton, New Jersey (BPH-900117MV). Jersey Shore is also the current licensee of WJRZ(FM), Channel 261A, Manahawkin, New Jersey. While its existing operation of WJRZ(FM) would not result in overlap with the proposed Tuckerton facility, the predicted 3.16 mV/m contour of the proposed operation on Channel 289B1 in Manahawkin would overlap with the 3.16 mV/m contour of the proposed Tuckerton facility in violation of 47 C.F.R. § 73.3555(a)(2), the signal overlap provision of the Commission's multiple ownership rule. Jersey Shore has requested a waiver of this rule. In support of its request, Jersey Shore states in pertinent part:

> Jersey Shore will either operate on Channel 289B1, allotted to Manahawkin, or it will operate the proposed Tuckerton station, which is consistent with the licensed WJRZ facilities under the F.C.C.'s multiple ownership rules.
>
> In the event of a grant of Jersey Shore's application for Channel 289B1, Manahawkin, NJ, then Jersey Shore would divest its interest in the Tuckerton, NJ station before commencement of program test authority on 289B1 at Manahawkin. In the event Jersey Shore's application for Channel 289B1 at Manahawkin is denied, then, as already noted, Jersey Shore's proposed operation at Tuckerton is compatible with the licensed operation of WJRZ, Manahawkin, NJ.

5. In essence, Jersey Shore is attempting to simultaneously prosecute two applications, both of which could not be granted. The filing of such inconsistent applications is expressly prohibited by 47 C.F.R. § 73.3518. The very purpose of the inconsistent application rule is to prevent the expenditure of limited staff resources on the processing of two applications which cannot both be granted. The *Report and Order* in MM Docket 84-750, *supra*, reiterated the Commission's strict adherence to the policy of rejecting those applications which violate Sections 73.3555 and 73.3518 so as to avoid the unnecessary outlay of Commission resources on the processing of two applications when only one of those can be legally granted.

6. Footnote 27 of the *Report and Order*, *supra*, states:

> In the event that multiple applications exceeding the prescribed limits [of the Commission's multiple ownership rules] are filed on the same day, the Commission will sequentially consider them in whatever order they are reached on the processing line until the multiple ownership limit is reached. Any remaining applications will be returned.[1]

Here, Jersey Shore's Tuckerton application was reached by the staff for processing prior to its Manahawkin application; the Manahawkin application will therefore be dismissed pursuant to 47 C.F.R. § 73.3518.

7. Likewise, Jersey Shore's request for waiver of 47 C.F.R. § 73.3555 must be similarly rejected. In essence, Jersey Shore has structured its request as a waiver of a rule section, when in actuality it is a request for an election to pursue whatever application happens to be successful. As stated previously, under the FM "hard look" processing policies, applicants are not given a choice as to which of two inconsistent applications they may prosecute. The gravamen of the rule violation was the *filing* of the inconsistent application. Jersey Shore's divestiture statement rings equally hollow. Jersey Shore's promise to divest itself, prior to program test authority, of its interest in Tuckerton - an interest affecting a violation of the multiple ownership rule - does not cure its violation of the inconsistent application rule. Divestiture of the Tuckerton application would necessitate dismissal of that application, and therefore, we would have processed an application knowing that a grant might not result in expedient service to the public. This is exactly the type of situation the inconsistent application rule has always proscribed. *See e.g., Big Wyoming Broadcasting Corp.*, 2 FCC Rcd at 34949. For the above stated reasons, the waiver request will be denied and the Jersey Shore application dismissed.

8. On August 6, 1990, Seashore Broadcasting Corporation ("Seashore"), the license of WOBM(FM), Toms River, New Jersey, filed a petition to deny the application of Jersey Shore. Jersey Shore has filed an opposition and Seashore a reply. In addition, Southern Ocean has filed comments on the petition. Seashore's petition alleges that Jersey Shore's application violates 47 C. F. R §§ 73.3517 (contingent applications), 73.3518 (inconsistent applications) and 73.3555 (multiple ownership). Seashore also alleges that Jersey Shore's application violates 47 C.F.R. § 73.3520 which prohibits the filing of multiple applications for the same class of facilities for the area or community by or for the benefit of the original parties in interest.

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[1] It has always been the Commission's purpose to apply the multiple ownership policies set forth in the *Report and Order*, in MM Docket 84-750, *supra*, to all situations embodied in Section 73.3555, of which the signal overlap provisions are clearly a part. Moreover, the Commission has always considered both the signal overlap and numerical limitation provisions under the general rubric of "multiple ownership rules." *See, e.g. WPOW, Inc.*, FCC 86-275, Mimeo No. 36723 (released June 4, 1986); *see also* the *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd at 1723 (1989).

Seashore's petition indicates that 85% of the ownership interest of Jersey Shore is held by Atlantic Broadcasting Corp. ("Atlantic") and 15% is held by Joan Beth Hansen. Joan Beth Hansen is also the 100% stockholder of Southern Ocean. Ownership in Atlantic is held by Joseph J. Knox, Jr. (29.4%), Joseph J. Knox, Sr. (47.1%), Elizabeth M. Knox (47.1%) and Brent G. McNally (23.5%). Seashore notes that Joan Beth Hansen is the brother of Joseph J. Knox, Jr. and the daughter of Joseph J. Knox, Sr. and Elizabeth M. Knox. However, Seashore fails to present any evidence of commonality of interest. Additionally, in a declaration attached to Southern Ocean's comments, Joan Beth Hansen states that she filed the Southern Ocean application independently and without advising her family members. Finally, in the *Report and Order*, in MM Docket 83-46, 49 Fed. Reg. 19496 (1984), the Commission stated that in companies with a single majority stockholder, the interests of any other stockholder shall not be considered cognizable for attribution purposes unless the stockholder is also an officer or director of the corporation. However, Joan Beth Hansen states that she resigned her position as an officer and director of Jersey Shore in 1983 and that, due to her estrangement from her brother and other family members, the extent of her involvement with Jersey Shore since that time has been attendance at annual meetings of the shareholders. Therefore, pursuant to the *Report and Order, supra*, her interest in Jersey Shore is not cognizable. Accordingly, in light of the foregoing, Seashore's petition to deny the application of Jersey Shore will be granted to the extent indicated and denied in all other respects.

9. *Press.* Press has requested a waiver of 47 C.F.R. § 73.3518, the Commission's inconsistent application rule, with respect to an application (BPH-870430NP) which it had previously filed on April 30, 1987 for Channel 253A, Ocean Acres, New Jersey. The predicted city-grade contour of Press' Manahawkin application would overlap with the city-grade contour of the Ocean Acres application in violation of 47 C.F.R. § 73.3555. The Ocean Acres application was returned by the Commission as unacceptable for tender in *Hearing Designation Order*, 4 FCC Rcd 1406 (1989). A petition for reconsideration of this action was filed on March 10, 1989 which remains pending before the Commission.

10. Press believes that:

> If the ultimate decision is that the [Ocean Acres] application was properly returned, Press will not have been foreclosed from filing under the Manahawkin window merely because it chose to exercise its rights of appeal as to the Ocean Acres application. If the ultimate decision is that the Ocean Acres application was not properly returned, Press would then be required to elect which application it would prosecute. *See RKO General, Inc.*, 57 RR2d 405, 412 (1984); *WSTV, Inc.*, 43 FCC 1254 (1953).

11. Pursuant to 47 C.F.R. §§ 1.65 and 73.3525, applications are considered "pending" before the Commission for the purposes of amendment or settlement until the grant or denial of the application is no longer subject to reconsideration or judicial review. Similarly, the Ocean Acres application is considered pending during such time that its petition for reconsideration is filed, pending, and, as yet, undecided. Clearly, this renders Press' Manahawkin application and its Ocean Acres application inconsistent pursuant to 47 C.F.R. § 73.3518.

12. Furthermore, in the instant scenario, applications have been filed containing impermissible duopoly overlap by the same applicant, Press. Therefore, Press' contention that it is entitled to elect which application to pursue is inapposite. Prior to our current "hard look" processing policies, applicants could file an inconsistent application which patently violated the multiple ownership rules vis-a-vis an earlier-filed application so long as the principal common to both applications held less than a controlling interest in either application. In such situations, the principal common to both applicants was permitted to elect to withdraw from either application so long as the principal held less than a controlling interest in either application. The filing of the Manahawkin application however, even under our pre -"hard look" policy, clearly violated Section 73.3518, which forbids the filing of subsequent inconsistent applications "by or on behalf of the same applicant, successor, assignee." Accordingly, Press' Manahawkin application must be dismissed.[2]

13. *Other Matters.* On February 26, 1984, the Commission adopted the *Hearing Designation Order* in MM Docket 84-115, 49 Fed. Reg. 6994 (1984) for Channel 290B1 in Newark, New Jersey.[3] On December 13, 1984, the presiding Administrative Law Judge issued an *Initial Decision* (FCC 84D-83), mimeo 1399, granting application BPH-821108AQ and denying all the other applicants in the proceeding. Numerous exceptions to the Judge's decision were filed with the Commission's Review Board. Therefore, on May 17, 1985 oral arguments were presented to the Board. On June 27, 1985, the Board issued a *Memorandum Opinion and Order* (FCC 85R-54), mimeo 5484, remanding the case to the presiding Administrative Law Judge. On February 12, 1986, the Judge issued a *Supplemental Initial Decision* (FCC 86D-11), mimeo 2653, granting application BPH-821108AV and denying all the other applicants. Again, numerous exceptions to the Judge's decision were made to the Review Board. As a result, on September 20, 1986, the Review Board overturned the decision of the Administrative Law Judge and granted application BPH-821105AR. *Order* (FCC 86R-65). Exceptions to the decision of the Review Board were once again filed with the Commission. On April 28, 1989, a Joint Petition for Settlement ("settlement") was filed by the remaining applicants in the Newark proceeding which provided for the grant of BPH-821105AR and the dismissal of all other applicants. On February 26, 1990, the Commission in a *Memorandum Opinion and Order* (FCC 90-86), 5 FCC Rcd 1634 (1990), approved the settlement, granted application BPH-821105AR, dismissed all the oth-

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[2] On August 6, 1990, Seaira filed a petition to deny the application of Press. Seaira's petition alleges that Press' application violates the Commission's inconsistent application and multiple ownership rules. In light of the action taken herein, Seaira's petition will be granted to the extent indicated herein.

[3] During the course of this proceeding, the Commission appointed an interim operator, Global Broadcasting Group, Inc., to operate the vacated facilities for Channel 290B1, Newark, New Jersey. The call sign for this permittee in WNWK.

er applicants and officially terminated the Newark proceeding. Numerous appeals of the Commission's action with respect to the settlement grant were filed. In the interim between the filing of the proposed settlement and the Commission's grant, the filing window for the Manahawkin, New Jersey allocation opened on December 18, 1989 and closed on January 17, 1990. Subsequently, after 12 applications had been filed for the allotment, the Commission released the Public Notice of Acceptance for Tender for the Manahawkin applicants on June 27, 1990. Pursuant to 47 C.F.R. § 73.3522(a)(6), the 30 day amendment of right period ended on July 30, 1990. On February 27, 1991, well after the last day for filing amendments as a matter of right in the Manahawkin proceeding had expired, the Commission set aside its earlier decision set forth in the February 26, 1990 *Memorandum Opinion and Order*, reopened the Newark proceeding, reinstated all the previously dismissed applications, and remanded the proceeding to the Administrative Law Judge. *Memorandum Opinion and Order*, (FCC 91-62), 6 FCC Rcd 1507 (1991). The Newark proceeding remains pending before the Administrative Law Judge. Several Notices of Appeal of FCC 91-62 have been filed in the D.C. Circuit Court of Appeals, as well. (Case Nos. 91-1161 and 91-1177).

14. Since the Commission set aside its prior action in the Newark proceeding and reinstated all previously dismissed Newark applicants after the close of the amendment of right period in Manahawkin, the Manahawkin applicants could not have anticipated the impact that this action would have upon their pending applications and their specific engineering proposals. The unexpected turn of events in the Newark proceeding being unforeseeable, we will not dismiss the applications of Atlantic, Coastal and LD. Rather, in the interest of fairness, we will afford them the opportunity to amend as set forth in the respective opinion paragraphs below.[4]

15. Furthermore, we recognize that the wording of § 73.215(b)(ii) does not, for "hard look" processing purposes, afford applicants full and explicit notice of the prerequisites they must meet to avoid summary dismissal. Accordingly, we will not dismiss the applications of Atlantic, Coastal, Jersey Devil and Southern Ocean for violation of this rule. *Compare Rochelle C. Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) *with Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991) (dismissal affirmed where rules are clear). Instead, these applicants must file curative amendments (as specified in their respective paragraphs) with the presiding Administrative Law Judge within 30 days of the release of this Order.

16. *Atlantic.* An engineering study of Atlantic's application reveals that the transmitter site proposed does not meet the spacing requirements of 47 C.F.R. § 73.207. Accordingly, Atlantic has requested that its application be processed under the provisions of 47 C.F.R. § 73.215 with respect to WQSR(FM), Catonsville, Maryland. However, our engineering study reveals that the Atlantic application also does not comply with the spacing requirements of 47 C.F.R. § 73.207 with respect to the reinstated application of BPH-821108BE, Newark, New Jersey. Atlantic had not requested that its application be processed under 47 C.F.R. § 73.215 with respect to this reinstated application. Specifically, Atlantic's proposed facility would receive objectional interference based on contour overlap from the 51 dBu contour of first-adjacent BPH-821108BE in an arc from approximately 25^0 T. to 355^0 T. from the applicant's site. However, our study indicates that the antenna height above average terrain (HAAT) proposed by application BPH-821108BE is 106.6 meters along the 193.09^0 T. radial. Using this HAAT value, the interfering contour (51 dBu) of BPH-821108BE extends 67.1 km. This point lies at an azimuth of 3^0 T. from the proposal. Our study also indicates that Atlantic's HAAT along the 3^0 T. radial is 105.4 meters. Using this HAAT, Atlantic's proposed protected contour (57 dBu) extends 45.7 km. This would cause a prohibited contour overlap of 3.90 km with BPH-821108BE in violation of 47 C.F.R. § 73.215.[5]

17. In addition, Atlantic's proposed facilities would also cause objectional interference based on contour overlap to the 57 dBu contour to first-adjacent BPH-821108BE in an arc from approximately 1.35^0 T. to 14.80^0 T. from Atlantic's proposed site. Our records indicate that the antenna HAAT of BPH-821108BE is 109.3 meters along the 195^0 T. radial. Using this HAAT value, the protected contour (57 dBu) of BPH-821108BE extends 46.3 km. This point lies at an azimuth of 4.79^0 T. from Atlantic's proposal. Our study indicates that Atlantic's HAAT along the 4.79^0 T. radial is 105.7 meters. Using this HAAT, Atlantic's proposed interfering contour (51 dBu) extends 66.4 km. This would cause a prohibited contour overlap of 4.29 km with BPH-821108BE in violation of 47 C.F.R. § 73.215. The staff's study reveals that the applicant can eliminate the overlap by reducing the effective radiated power (ERP) to 16.0 kilowatts with the proposed directional antenna. Atlantic will be allowed to amend its application to correct this defect pursuant to paragraphs 14 and 15 above.

18. *Coastal.* An engineering study of the Coastal application reveals that the transmitter site proposed does not meet the spacing requirements of 47 C.F.R. § 73.207. Accordingly, Coastal has requested that its application be processed under the provisions of 47 C.F.R. § 73.215 with respect to WQSR(FM), Catonsville, Maryland and to the Newark interim operator, WNWK. However, our engineering study reveals that the Atlantic application also does not comply with the spacing requirements of 47 C.F.R. § 73.207 with respect to the reinstated applications of BPH-821108AQ, BPH-821108BK, BPH-821108AV; BPH821108AR, BPH-821108AS, and BPH-821108BE, Newark, New Jersey. Specifically, the application is 8 kilometers short-spaced to application BPH-821108AQ; 8 kilometers short-spaced to application BPH-821108BK; 8 kilometers short-spaced to application BPH-821108AV; 8

[4] Additionally, the *Report and Order*, in MM Docket No. 89-17, 4 FCC Rcd 7821 (1989), which established the Manahawkin allocation on Channel 289B1, specified a site restriction only with respect to the interim operator, WNWK, for the Newark channel. Consequently, Manahawkin applicants Coastal, Atlantic, and LD have adequately protected the interim operator, but failed to take cognizance of all other applicants in the Newark proceeding.

[5] Pursuant to 47 C.F.R. § 73.215(b)(2)(ii) distances to the protected and interfering contours of existing allotments and applications not requesting authorization pursuant to this section are based on the presumed use of the maximum ERP and HAAT for the applicable station class.

kilometers short-spaced to application BPH821105AR; 8 kilometers short-spaced to application BPH-821108AS; 8.4 kilometers short-spaced to construction permit BMPHI-850109IF, WNWK(FM), Newark; and 9.7 kilometers short-spaced to application BPH-821108BE.

47 C.F.R. § 73.215(e) specifically states:

> Until further Notice, the Commission will not accept applications that specify short-spaced antenna locations pursuant to this section wherein the proposed distance separation is less than the normally required distance separation in §73.207 by more than 8 kilometers.

19. Coastal's proposal complies with the provisions of 47 C.F.R. §73.215 with respect to applications BPH-821108AQ, BPH-900725IC, BPH-821108BK, BPH-821108AV, BPH-821105AR, BPH-821108AS and the construction permit for WNWK, Newark, New Jersey, (File No. BMPHI-850109IF) because all the short-spacings are 8 kilometers or less (rounding to the nearest kilometer). However, the Coastal proposal is 9.7 kilometers short-spaced to application BPH-821108BE for the Newark facility in violation of 47 C.F.R. § 73.215(e). This excessive short-spacing is not addressed in Coastal's application. However, Coastal will be allowed to amend its application to correct this defect pursuant to paragraphs 14 and 15 above.

20. *Jersey Devil.* An engineering study of the Jersey Devil application reveals that the transmitter site proposed does not meet the spacing requirements of 47 C.F.R. § 73.207. Accordingly, Jersey Devil has requested that its application be processed under the provisions of 47 C.F.R. § 73.215 with respect to stations WQSR(FM), Catonsville, Maryland and WBNJ(FM), Cape May Courthouse, New Jersey. However, our engineering study reveals that Jersey Devil's calcuations with respect to WBNJ(FM) are in error. Specifically, Jersey Devil's proposed facilities would receive objectional interference, based on contour overlap from the 51 dBu contour, of WBNJ(FM) in an arc from approximately 210^0 T. to 220^0 T. from the applicant's site. Our study indicates that WBNJ(FM)'s antenna height above average terrain (HAAT) is 98.8 meters along the 38.82^0 T. radial. Using this HAAT value, WBNJ's interfering contour (51 dBu) extends 50.5 km. This point lies at an azimuth of 216^0 T. from the Jersey Devil's proposal. Our study also shows that Jersey Devil's HAAT along the 216^0 T. radial is 109.0 meters. Using this HAAT, the proposed protected contour (57 dBu) extends 31.5 km. This would cause a prohibited contour overlap of 0.84 km in violation of 47 C.F.R. § 73.215. Our engineering study reveals that the applicant can eliminate the overlap by reducing the effective radiated power (ERP) to 22.0 kilowatts utilizing the proposed directional antenna. Jersey Devil will be allowed to amend its application pursuant to paragraph 15 above.

21. *Southern Ocean.* An engineering study of the application of Southern Ocean reveals that the transmitter site proposed does not meet the spacing requirements of 47 C.F.R. § 73.207. Accordingly, Southern Ocean has requested that its application be processed under the provisions of 47 C.F.R. § 73.215 with respect to all applications for the Newark, New Jersey facility, the interim operator for Newark, and stations WQSR(FM), Catonsville Maryland and WBNJ(FM), Cape May Courthouse, New Jersey. However, our engineering study reveals that Southern Ocean's calculations with respect to WQSR(FM) are in error. Specifically, Southern Ocean's proposed operation would be in violation of the prohibited contour overlap provisions of 47 CFR § 73.215 with respect to the license for WQSR(FM) in Catonsville, MD on Channel 289B. Southern Ocean's proposed facilities would cause objectional interference based on contour overlap to the 54 dBu contour of licensed co-channel adjacent Station WQSR(FM), Catonsville, MD in an arc from approximately 248.16^0 T. to 262.71^0 T. from the applicant's proposed site. Additionally, our study indicates that WQSR(FM)'s antenna height above average terrain (HAAT) is 188.1 meters along the 77.0^0 T. radial. Using this HAAT value, WQSR(FM)'s protected contour (54 dBu) extends 69.4 km. This point lies at an azimuth of 254.52^0 T. from the proposal. Our study also shows that the Southern Ocean's HAAT along the 254.52^0 T. radial is 81.4 meters. Using this HAAT, the proposed interfering contour (34 dBu) extends 138.4 km. This would cause a prohibited contour overlap of 4.68 km with WQSR(FM) in violation of 47 CFR § 73.215. Furthermore, similar calculation errors exist with respect to the construction permit, BMPHI-850109IF, WNWK(FM), Newark, New Jersey and the applicants BPH-821108AQ, BPH-821108BK, BPH-821108AV, BPH-821105AR, BPH-821108AS, BPH-821108BE for a new FM broadcast station in Newark, NJ on Channel 290B1. The staff's study reveals that the applicant can eliminate the excessive overlap by reducing the effective radiated power (ERP) to 7.8 kilowatts with the proposed directional antenna. Accordingly, Southern Ocean will be allowed to amend its application pursuant to paragraph 15 above.

22. *LD.* A preliminary engineering study of LD's application reveals that it is short-spaced by 0.8 kilometer, in violation of 47 C.F.R. § 73.207, to the reinstated application BPH-821108BE for first-adjacent channel 290B1 in Newark, NJ. The required spacing for first-adjacent channel Class B1 stations is 114 km while the actual spacing proposed in LD's application is 113.2 km. This short spacing was not addressed in LD's application, and an amendment must therefore be submitted pursuant to paragraph 14, above.

23. *Great American.* An engineering study of the application of Great American reveals that there is a discrepancy in the calculation of the antenna height above average terrain (HAAT). Specifically, the HAAT as listed in Item 7(b)(3) of Section VB is 137 meters. However, the HAAT as calculated by averaging the eight radials provided in response to Item 18, Section V-B is 139 meters. Since neither HAAT value, used in conjunction with the proposed ERP of 4.1 kw, would violate a Commission rule, this discrepancy is not considered an acceptability defect, and may be corrected by an amendment that includes all exhibits that will be affected by this change. This amendment shall be filed with the presiding Administrative Law Judge within 30 days of the release of this Order.

24. *Seaira.* Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Seaira has not completed Item 6 correctly. Seaira's application gives a post office box number as the residence address for William White. Accordingly, Seaira must submit an amendment which gives all the

information required by Section II, Item 6 to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. Seaira is the permittee of WQNJ(FM) in Ocean Acres, New Jersey. Seaira has indicated its intent to divest itself of all interest in and sever all connection with WQNJ(FM) in the event of grant of the referenced Manahawkin application. Accordingly, in the event of grant of Seaira's application, Seaira, Inc. and all of its principles will be required to divest themselves of all interest in and sever all connection with WQNJ(FM) prior to the commencement of program test authority.

26. Seaira proposes to mount its antenna on an existing tower structure. However, the tower data submitted by Seaira in Section V-B, Item 7, Form 301, is inconsistent with that contained in the Commission's records. Seaira lists the overall height above ground (including the antenna) as 117 meters. Commission records indicate an overall height above ground figure of 109.7 meters for the existing tower. Because Seaira is clearly proposing to mount its antenna on an existing tower structure that is contained in the Commission's records, the discrepancy is neither a tenderability nor an acceptability defect and may be correctd by an amendment. Accordingly, Seaira must either file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order correcting the antenna height above ground figure as listed in its application, or submit documentation to establish that the height specified is, in fact, correct and the Commission's records are in error. In addition, because of this discrepancy, an FAA issue will be specified.

27. *Southern Ocean.* Joan Beth Hansen , the sole principal of Southern Ocean, is a 15% shareholder of Jersey Shore Broadcasting Corporation, the licensee of WJRZ(FM) in Manahawkin, New Jersey. She has indicated her intent to terminate her relationship with Jersey Shore in the event of grant of the referenced application. Accordingly, in the event of grant of Southern Ocean's application, Joan Beth Hansen will be required to divest all interest in and sever all connection with Jersey Shore Broadcasting Corporation prior to the commencement of program test authority.

28. *LD.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although LD has filed such statement, it is deficient. LD has indicated that in carrying out its recruiting efforts that it will contact a variety of minority and women's organizations; will deal with employment services which do not discriminate in referral of candidates; and will recruit prospective employees from educational institutions with minority and women enrollments. LD is required by Section VI to provide examples of the above organizations it will utilize for recruiting, but has failed to do so. Accordingly, will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

29. Jersey Devil petitioned for leave to amend its application on January 18, 1991. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

30. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

31. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

32. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Seaira would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

33. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 2 through 12, above, the applications of Great Scott, Sage, Jersey Shore, and Press ARE DISMISSED as inadvertently accepted for filing pursuant to 47 C.F.R. § 73.3566(a).

34. IT IS FURTHER ORDERED, That the petition to deny filed by Seashore Broadcasting, Inc. with respect to the application of Jersey Shore IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

35. IT IS FURTHER ORDERED, That the petition to deny filed by Seaira with respect to the application of Press IS GRANTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 13 through 22 above, Atlantic, Coastal, Southern Ocean, LD and Jersey Devil shall file their respective requested amendments with the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED, That Great American shall file the amendment specified in paragraph 23 with the presiding Administrative Law Judge within 30 days of the release of this Order.

38. IT IS FURTHER ORDERED, That Seaira shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

39. IT IS FURTHER ORDERED, That in the event of grant of Seaira's application, the applicant and all its principles will divest all interest in and sever all connection with Station WQNJ(FM), Ocean Acres, New Jersey prior to the commencement of program test authority.

40. IT IS FURTHER ORDERED, That Seaira shall submit an amendment in accordance with paragraph 26 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

41. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

42. IT IS FURTHER ORDERED, That in the event of grant of Southern Ocean's application, Joan Beth Hansen shall divest all interest in and sever all connections with Station WJRZ(FM), Manahawkin, New Jersey prior to the commencement of program test authority.

43. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, LD shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

44. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Jersey Devil IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

45. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

46. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

47. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-172

In re Applications of

CAROL SUE BOWMAN	File No. BPH-880406MH
JOSEPH B. PRATER and JOSEPH DURHAM, A PARTNERSHIP, d/b/a PRATER & DURHAM	File No. BPH-880406MJ
HEART OF VIRGINIA BROADCASTING	File No. BPH-880406ND

For Construction Permit for a New FM Radio Station to Operate on Channel 268A in Vinton, VA

ORDER

Adopted: July 29, 1991; Released: August 6, 1991

By the Commission:

1. In an *Order*, FCC 90M-2997, released September 21, 1990, Administrative Law Judge Joseph Chachkin (ALJ) dismissed Prater and Durham's (P&D) application for its failure to timely demonstrate its financial qualifications and for failing to comply with its discovery obligations in the proceeding. The Review Board affirmed P&D's dismissal. *Carol Sue Bowman*, 6 FCC Rcd 10 (1991). We agree with the Board's disposition of this matter and affirm its decision.[1]

2. There are several matters, however, that warrant brief comment. P&D argues that the Commission holding in *Edwin A. Bernstein* 5 FCC 2843 at n.1 (1990), where it rejected a contention that current Commission policy does not require applicants to promptly amend defective financial proposals as a condition precedent to the continued prosecution of the application, was merely *dicta*. We disagree. The Commission's dismissal of the *Bernstein* application was predicated on the applicant's failure to timely amend its negative financial certification, and, thus, its holding in that footnote was not *dicta*. Hence, the Board properly relied on that footnote in rejecting P&D's contention that it did not have to promptly amend its negative financial certification based on a good cause showing. Moreover, we reject P&D's further contentions that the Commission has not given the type of notice required when an agency effectuates a change in its policy, and that the *Bernstein* footnote and other relevant cases cited by the Board were not adequate to give P&D ample notice of the Commission's current amendment policy. *See* 6 FCC Rcd at 11-12 paras. 8-10.

3. P&D also contends that the Board's reliance on *Bernstein* as requiring applicants to promptly amend defective financial proposals is at odds with *South Florida Broadcasting Co., Inc.* 94 FCC 2d 452, 454-455 (1983), where the Commission dealt with financial certification amendments and held that such amendments would not even be considered, as well as with the Bureau's practice of not accepting such amendments, citing *City of Light Communications, Inc.*, 65 RR 2d 173 (M.M.B. 1989) and similar cases. This argument also has no merit. The Commission in *South Florida* concluded that the Bureau's former practice of permitting applicants to amend their negative financial certifications by merely recertifying that they were financially qualified without submitting supporting documentation was inconsistent with the intent of the certification procedure. Hence, it required all applicants in that case to submit documentation of their financial qualifications and, failing that, authorized the ALJ to specify appropriate financial issues against those who did not. That case does not stand, as P&D implies, for the proposition that applicants against whom financial issues are specified can demonstrate at hearing that they are financially qualified.[2]

4. P&D also complains that the Board in affirming the ALJ's action failed to consider that P&D was being penalized for the failings of counsel, a factor which it contends must be considered by the Commission prior to dismissing an application. To the extent that P&D is contending that counsel's action should militate against the dismissal of its application, we reject such a contention. We have held that counsel is the applicant's agent when appearing before the Commission, and that applicants are therefore bound by counsel's action. *See Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n.6 (1986). We see no reason, nor has P&D shown any, why we should hold otherwise here.

5. ACCORDINGLY, IT IS ORDERED, That the Reply filed March 14, 1991, by P&D, the Motion to Comment thereon filed March 29, 1991, by Bowman, the Motion to Supplement Opposition filed April 10, 1991, by Bowman, and the Response to the Motion to Supplement filed April 19, 1991, by P&D ARE DISMISSED.

6. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed February 14, 1991, by P&D IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission is an Application for Review filed February 14, 1991, by P&D; an Opposition filed March 1, 1991, by Carol Sue Bowman (Bowman); a Reply filed March 14, 1991, by P&D; a Motion to file Comments on P&D's Reply and accompanying Comments filed March 29, 1991, by Bowman; a Motion to Supplement Opposition to Application for Review and Supplement filed April 10, 1991 by Bowman; and a Response to Supplement filed April 19, 1991 by P&D. As P&D did not request permission to file its Reply of March 14, the plead-

ing is unauthorized and will be dismissed. *See* 47 C.F.R. § 1.115(d). Hence, Bowman's Motion to Comment on that pleading is moot, and it likewise will be dismissed. We will also dismiss Bowman's Motion to Supplement its Opposition and P&D's Response thereto. The former merely seeks to report a recent court action upholding a Commission decision that was relied on by the Board and which is a matter of public record; *i.e Edwin A. Bernstein*, 4 FCC 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC rcd 2843 (1990), *aff'd sub nom. Virginia Lefebvre v.* FCC (D.C. Cir. March 3, 1991). P&D's Response, which is essentially a supplement to its Application for Review, is untimely in that it was filed beyond the 30 days allowed for the filing of such pleadings as set forth in 47 C.F.R. § 1.115(d) and no good cause warranting further consideration has been shown.

[2] In *City of Light* and other similar cases cited by P&D, the Bureau rejected the amendments because they were filed after the date for allowing amendments as of right and the applicants failed to demonstrate good cause for their acceptance as required by 47 C.F.R. § 73.3522(a)(6). In such situations, the Bureau held that rejection of the amendments, rather than the dismissal of the applications, was the appropriate remedy, since a financial issue would be specified against the applicants in the designation orders of the proceedings. Hence, those cases have no relevancy to the issue here; *i.e.*, whether P&D was required to file a good cause *post-designation* amendment to cure its negative financial certification.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-222

In the Matter of

Amendment of Section 73.202(b), RM-7204
Table of Allotments,
FM Broadcast Stations.
(Crane, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1991; Released: August 8, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Albert L. Crain ("petitioner"), permittee of Station KAIR(FM), Channel 265A, Crane, Texas, requesting the substitution of Channel 267C1 for Channel 265A at Crane, Texas, and the modification of his authorization for Station KAIR(FM) to specify operation on the higher powered channel.[1] Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 267C1 for Channel 265A at Crane, Texas, since it could provide the community with a wide coverage area FM service. Channel 267C1 can be allotted to Crane in compliance with the Commission's minimum distance separation requirements at the site specified in Station KAIR(FM)'s construction permit.[2] Since Crane is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been solicited.

3. As requested, we also propose to modify petitioner's authorization for Station KAIR(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 267C1 at Crane or require the petitioner to demonstrate the availability of an additional equivalent class channel.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Crane, Texas	265A	267C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and its consultant, as follows:

Albert L. Crain
Route 6, Box 250
Byhalia, Mississippi 38611
(Petitioner)

Robert A. Lynch
Independent Broadcast Consultants, Inc.
110 County Road,146
RFD# 1, Box# 312
Trumansburg, New York 14886
(Engineering consultant)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

[1] Although petitioner signed his request, he did not include his address. Therefore, he has failed to meet the requirements of Section 1.52 of the Commission's Rules. Section 1.52 requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by counsel. Therefore, petitioner is requested to comply with all requirements of Section 1.52 in submitting comments. Failure to do so will result in dismissal of his petition.

[2] The coordinates for Channel 267C1 at Crane are North Latitude 31-21-56 and West Longitude 102-20-22.

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-509

In the Matter of

Amendment of Section 73.202(b), RM-7360
Table of Allotments,
FM Broadcast Stations.
(Port Henry, New York, and
Middlebury, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1991; Released: August 8, 1991

By the Chief, Allocations Branch:

1. At the request of Pro-Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 6555 (1990), proposing the substitution of Channel 221C3 for Channel 221A at Port Henry, New York, and the modification of its license for Station WMNM(FM) to specify the higher powered channel. To accommodate the substitution at Port Henry, the *Notice* also proposed the substitution of noncommercial educational Channel 210A for Channel 219A at Middlebury, Vermont, and the modification of The Presidents and Fellows of Middlebury College's ("the College") license for Station WRMC-FM to specify the alternate Class A channel. Comments were filed by the College, petitioner and St. Lawrence University ("St. Lawrence"), applicant for a new noncommercial educational station on Channel 210C3 at North Creek, New York.

2. In response to the *Order to Show Cause*, the College states that it has no objection to the change in Station WRMC-FM's channel to accommodate the upgrading of Station WMNM(FM). However, because the allotment of Channel 210A at Middlebury conflicts with the pending application (BPED-900117MA) of St. Lawrence for a North Creek station, it instead requests the substitution of Channel 216A for Channel 219A at Middlebury.[1] Petitioner, in its comments, reiterates its intention to apply for Channel 221C3, if allotted to Port Henry, and its willingness to reimburse Station WRMC-FM for the costs associated with its change in channel.

3. We believe the public interest would be served by substituting Channel 221C3 for Channel 221A at Port Henry, New York, and substituting Channel 216A for Channel 219A at Middlebury, Vermont, because it could provide Port Henry with a wide coverage area FM service. As proposed, we will also modify petitioner's license for Station WMNM(FM) to specify operation on Channel 221C3 and the College's license for Station WRMC-FM to specify operation on Channel 216A. As stated in the *Notice*, there is no overlap of the Port Henry Channel 221C3 1 mV/m contour and the Grade B contour of any Channel 6 TV station. Further, we find that Channel 216A at Middlebury will also provide adequate protection to the nearby Channel 6 Station WRGB(TV), Schenectady, New York.

4. Channel 221C3 can be allotted to Port Henry in compliance with the Commission's minimum distance separation requirements with regard to all domestic allotments at Station WMNM(FM)'s presently licensed transmitter site.[2] We recognize that this allotment does result in a 7 kilometer (4.3 mile) shortspacing to the proposed allotment of Channel 221C1 at Ottawa-Hull, Ontario, Canada. However, based upon a finding that Channel 221C3 at Port Henry will not result in any prohibited overlap of the protected contour of the proposed Ottawa-Hull allotment, Canadian concurrence in the Port Henry allotment as a specially negotiated allotment has been received. Channel 216A can be allotted to Middlebury in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in the College's pending application.[3] Canadian concurrence in the Middlebury allotment has also been received because the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with *Circleville, Ohio*, 8 FCC 2d 159 (1967), petitioner is required to reimburse Station WRMC-FM for the reasonable and necessary expenses of changing its operating channel.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Port Henry, New York	221C3

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Pro-Radio, Inc., for Station WMNM(FM), Port Henry, New York, IS MODIFIED to specify operation on Channel 221C3, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

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[1] St. Lawrence's comments are directed only at the conflict between its North Creek application and the allotment of Channel 210A to Middlebury, Vermont. However, the conflict is resolved based on the College's request for Channel 216A instead of 210A. Therefore, we will not discuss St. Lawrence's comments.

[2] The coordinates for Channel 221C3 at Port Henry are North Latitude 44-01-38 and West Longitude 73-28-54.

[3] The coordinates for Channel 216A at Middlebury are North Latitude 44-01-34 and West Longitude 73-09-44.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of The Presidents and Fellows of Middlebury College for Station WRMC-FM, Middlebury, Vermont, IS MODIFIED to specify operation on Channel 216A in lieu of Channel 219A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WRMC-FM's license, BLED-820201AI, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 340).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLED-820201AI, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: Station WRMC-FM, The Presidents and Fellows of Middlebury College, Old Chapel, Middlebury, Vermont 05753.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-537

In the Matter of

Amendment of Section 73.202(b),	RM-7455
Table of Allotments,	RM-7684
FM Broadcast Stations.	
(Amarillo, Claude and	
Dimmitt, Texas[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1991; Released: August 8, 1991

By the Chief, Allocations Branch:

1. At the request of Alton Lloyd Finley, Jr. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6761 (1990), proposing the allotment of Channel 241A to Amarillo, Texas, as the community's tenth local FM service. Petitioner filed comments restating his continuing interest.[2] Lucille Ann Lacy ("Lacy") filed comments and a counterproposal.[3]

2. Lacy's counterproposal requests the substitution of Channel 239C1 for Channel 239A at Claude, Texas, and the modification of her construction permit (BPH-900108NZ) accordingly. To accommodate her counterproposal, Lacy also requests the substitution of Channel 263C3 for Channel 240C3 at Dimmitt, Texas, the modification of the construction permit for Station KDIU(FM), Dimmitt, accordingly, and the allotment of Channel 259A to Amarillo in lieu of Channel 241A. In his comments, petitioner states that he will apply for either Channel 241A or 259A at Amarillo.

3. We note that Lacy filed an identical proposal in response to the *Notice of Proposed Rule Making* in MM Docket No. 90-547, 5 FCC Rcd 6729 (1990). The only connection between MM Docket No. 90-547 and this proceeding is that the proposal to allot Channel 241A to Amarillo would preclude consideration of Lacy's counterproposal. Rather than consolidate the dockets, we believe the public interest would best be served by the allotment of Channel 259A, rather than Channel 241A, to Amarillo as an additional service to that community. This will remove any conflict with Lacy's counterproposal, which will be resolved in MM Docket No. 90-547. We have confirmed that Channel 259A can be allotted to Amarillo, Texas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Amarillo, Texas	226C1, 231C, 245C, 250C, 254C1, 259A, 265C1, 270C, 275C1, 289A

5. The window period for filing applications will open on **September 24, 1991,** and close on **October 24, 1991**.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Lucille Ann Lacy (RM-7684) IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The communities of Claude and Dimmitt, Texas, have been added to the caption.

[2] Although untimely filed, we will consider petitioner's comments in light of the fact that acceptance of petitioner's expression of interest would not require the denial or dismissal of another timely proposal for use of the spectrum.

[3] Public Notice of the counterproposal was given March 27, 1991, Report No. 1842.

[4] The coordinates for Channel 259A at Amarillo are North Latitude 35-11-19 and West Longitude 101-48-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-223

In the Matter of

Amendment of Section 73.202(b), RM-7758
Table of Allotments,
FM Broadcast Stations.
(Rozel, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1991; Released: August 8, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Lee E. Scott ("petitioner"), requesting the substitution of Channel 254C1 for Channel 254A at Rozel, Kansas. Petitioner also requests modification of his construction permit (BPH-890217MP) for Station KGZE to specify operation on Channel 254C1. Petitioner indicated he would file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide a wide coverage area station to Rozel, Kansas. Channel 254C1 can be allotted to Rozel, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the construction permit for Station KGZE, Channel 254A, to specify operation on Channel 254C1 in accordance with Section 1.420(g) of the Commission's Rules, and will not accept competing expressions of interest for use of the channel or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Rozel, Kansas	254A	254C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Lee E. Scott
Box 125
Rozel, Kansas 67574

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 254C1 are 38-20-00 and 99-40-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-224

In the Matter of

Amendment of Section 73.202(b), RM-7756
Table of Allotments,
FM Broadcast Stations.
(Americus, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1991; Released: August 8, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. Sumter Broadcasting Co., Inc. ("petitioner"), licensee of Station WPUR(FM), Channel 254A, Americus, Georgia, has filed a petition for rule making requesting the substitution of Channel 254C3 for Channel 254A at Americus, Georgia, and modification of its license for Station WPUR(FM) to specify the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because it could provide a wide coverage area FM service to Americus. An engineering analysis has determined that Channel 254C3 can be substituted for Channel 254A at Americus in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. As requested, we shall also propose to modify the license of Station WPUR(FM) to specify operation on Channel 254C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Americus or require the proponent to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Americus, Georgia	234C3, 254A	234C3, 254C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy F. Perkins, Jr.
Sumter Broadcasting Co., Inc.
1724 Whitewood Lane
Herndon, Virginia 22070
(Attorney for Sumter Broadcasting Co., Inc.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 254C3 at Americus are North Latitude 32-04-51 and West Longitude 84-15-20.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-225

In the Matter of

Amendment of Section 73.202(b), RM-7759
Table of Allotments,
FM Broadcast Stations.
(Crosby, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1991; Released: August 8, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by First Radio Station of Crosby, Inc. ("petitioner"), requesting the substitution of Channel 268C3 for Channel 269A at Crosby, Minnesota. Petitioner also requests modification of its construction permit for Station KTCF-FM, Channel 269A, to specify operation on Channel 268C3. Petitioner provided an engineering study in support of the proposal and indicated it would file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide a wide coverage area station to Crosby, Minnesota. Channel 268C3 can be allotted to Crosby, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Crosby is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify the construction permit for Station KTCF-FM, Channel 269A, to specify operation on Channel 268C3 in accordance with Section 1.420(g) of the Commission's Rules and will not accept competing expressions of interest for use of the channel or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Crosby, Minnesota	269A	268C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 30, 1991** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert J. Rini
Stephen E. Coran
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 268C3 are 46-33-09 and 93-57-16.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

REPORT AND ORDER
AND
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 11, 1991; Released: August 9, 1991

Comment date: November 7, 1991
Reply comment date: December 9, 1991

By the Commission:

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I. INTRODUCTION

1. This Report and Order and Further Notice of Proposed Rule Making amends Part 64 of the Commission's rules by adopting provisions that require the unblocking of equal access ("10XXX") codes by payphone providers within six months and, at other aggregator locations, in phases over an approximately six-year transition period. We also require the establishment of 800 or 950 access numbers by all operator service providers ("OSPs") within six months. In addition, we have determined that owners of competitive public payphones, as defined herein, should be compensated for access code calls, and we tentatively conclude that such compensation should be collected through direct billing arrangements with OSPs. We seek comment on our tentative conclusion regarding the compensation mechanism and on what charge would be the appropriate basis for such compensation. These decisions satisfy statutory requirements [1] and will encourage the development of an operator services marketplace in which consumers have ready access to their preferred OSPs and in which the provision of payphone service is supported by all entities that benefit from such service.

II. BACKGROUND

2. The impetus for the Commission's proceedings on operator service issues was the set of problems that arose with the entry of competitors into the operator services[2] marketplace following the divestiture of AT&T. Both net-

[1] *See* 47 U.S.C. § 226(e).

[2] The term "operator services" refers to "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than -- (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 U.S.C. § 226(a)(7); *accord* 47 C.F.R. § 64.708(g).

work-based OSPs and companies that combine their own operator service elements with the leased telephone lines of other carriers began to compete for presubscription contracts that allowed them to provide operator services for call aggregators.[3] A caller using an aggregator's telephone is automatically connected to the presubscribed OSP unless an access code[4] is dialed.

3. Widespread consumer dissatisfaction over the rates and practices of many OSPs led the Commission to address the problems first in a formal complaint proceeding"[5] and then in a general rule making proceeding that was recently completed as part of CC Docket No. 90-313.[6] In the original Notice of Proposed Rule Making in that docket, we sought comment on rules concerning consumer information, call blocking, call splashing, interexchange carrier access, and the capabilities of aggregator equipment. Among the proposed rules were provisions that would have prohibited the blocking of calls initiated with 10XXX codes and that would have required all interexchange carriers to establish an 800 or 950 access number. Many parties submitted detailed comments on these latter two proposals, and some parties also commented on the need for us to prescribe compensation for competitive public payphone owners for access code calls.

4. During the first comment period in CC Docket No. 90-313, Congress passed the Telephone Operator Consumer Services Improvement Act of 1990.[8] Section 226(e) of the Act specifically requires us to conduct a separate rule making proceeding to address operator service access and payphone compensation issues:

> (e) Separate Rulemaking on Access and Compensation.--
>
> (1) Access. --The Commission, within 9 months after the date of enactment of this section, shall require--
>
> (A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or
>
> (B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or
>
> (C) that the requirements described under both subparagraphs (A) and (B) apply.
>
> (2) Compensation. --The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after the date of enactment of this section, the Commission shall reach a final decision on whether to prescribe such compensation.

Because of these statutory requirements, we concluded in a Further Notice in CC Docket No. 90-313 that we would have to begin a separate proceeding on the access and compensation issues specified by the Act.[9] On March 11, 1991, we released a Notice of Proposed Rule Making that initiated the separate proceeding, CC Docket No. 91-35, and that sought comment on proposed rules and regulatory options concerning access and compensation.[10]

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[3] An "aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2); 47 C.F.R. § 64.708(b). Aggregators include hotels and motels, hospitals, universities, airports, gas stations, pay telephone owners, and others. Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313: Report and Order, 6 FCC Rcd 2744, 2752, 56 Fed. Reg. 18,519, 25,721 (1991), *petitions for reconsideration pending;* S. Rep. No. 439,101st Cong., 2d Sess. 10 (1990) (Committee report on the Telephone Operator Consumer Services Improvement Act of 1990).

[4] An "access code" is a sequence of numbers that, when dialed, connects the caller to the operator service provider associated with that sequence. 47 U.S.C. § 226(a)(1); 47 C.F.R. § 64.708(a). An "equal access code" is an access code that allows the public to obtain an equal access connection to the carrier associated with that code. 47 U.S.C. § 226(a)(6); 47 C.F.R. § 64.708(f)."Equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the court in its orders issued prior to the enactment of 47 U.S.C. § 226.47 U.S.C. § 226(a)(5); 47 C.F.R. § 64.708(e). We will use "10XXX code" interchangeably with "equal access code."

[5] *See* Telecommunications Research & Action Center v. Central Corp., 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (hereinafter *TRAC Order*), *application for review pending.*

[6] *See* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313: Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (hereinafter *90-313 NPRM*); Further Notice of Proposed Rule Making, 6 FCC Rcd 120 (1990) (hereinafter *90-313 Further NPRM*); Report and Order, 6 FCC Rcd 2744, 56 Fed. Reg. 18,519, 25,721 (1991) (hereinafter *90-313 Report and Order*), *petitions for reconsideration pending.*

[7] *TRAC Order*, 4 FCC Rcd at 2159; *see also id.* at 2160 nn. 5-6 (definitions of "call blocking" and "call splashing").

[8] Pub. L. No. 101-435,104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("Operator Services Act"). The President signed the Act into law on October 17, 1990.

[9] *90-313 Further NPRM*, 6 FCC Rcd at 122. We noted that all relevant comments filed in CC Docket No. 90-313 would be considered in the separate proceeding. *Id.*

[10] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Notice of Proposed Rule Making, 6 FCC Rcd 1448 (1991) (hereinafter *NPRM*) . In response to the *NPRM*, over 130 comments and reply comments were filed. In CC Docket No. 90-313, over 450 comments and reply comments were filed during two separate comment periods. A list of all commenting parties in CC Docket No. 91-35, other than those filing individual letters, is contained in Appendix A. Commenters in CC Docket No. 90-313 are listed in Appendix A of the *90-313 Report and Order*. We will refer to comments in CC Docket No. 91-35 as "91-35 Comments" or "91-35 Reply Comments," as appropriate. For

III. DISCUSSION

A. Operator Service Access

1. Statutory requirements and proposed options

5. As noted above, the Operator Services Act directs us to require within a reasonable time: (a) the unblocking of 10XXX access at all aggregator locations; or (b) all OSPs to establish an 800 or 950 access number; or (c) both (a) and (b). [11] In the *NPRM*, we noted two main reasons for considering 10XXX access an important method for achieving free choice for consumers in the operator services marketplace. First, we cited the statutory requirement that all aggregator equipment manufactured or imported on or after April 17, 1992 have 10XXX capabilities, which implicitly ensures eventual 10XXX access at most aggregator locations.[12] Second, we mentioned the technical flexibility and choice that 10XXX access apparently provides to consumers and carriers.[13] We went on to seek comment on proposed rules that would have required 10XXX unblocking at all aggregator locations on a three-year schedule according to equipment type and would have required aggregators to modify their equipment to satisfy the unblocking requirements.[14] Under this proposal, aggregators would have had to modify their equipment to recognize and selectively block only those 10XXX dialing sequences that would result in billing to the originating telephone, without at the same time blocking other 10XXX calls. As an alternative to our equipment retrofitting proposal, we sought comment on whether we should require local exchange carriers (LECs) to provide tariffed blocking and screening services that would prevent 10XXX calls from being billed to the originating aggregator telephone, an apparently frequent source of toll fraud.[15] We also raised the possibility of allowing conversion to 10XXX access by attrition, as nonconforming equipment is voluntarily replaced.[16] In addition to our tentative conclusion that "universal establishment of 10XXX access should be our long-term goal," we asked whether requiring the establishment of 800 or 950 access would be in the public interest.[17] We viewed 800 and 950 numbers as potential interim access methods during the period when 10XXX access would be temporarily unavailable because of either equipment or network limitations.[18]

2. Discussion

6. Based on the evidence before us, we now conclude that universal 10XXX access should be our long-term goal because it is the most efficient access method for consumers to use in reaching their preferred operator service providers. The record has persuaded us that payphones can be modified at a reasonable cost to allow 10XXX access. Thus, we have decided to require payphones to allow 10XXX access within six months. The record also shows that some non-payphone aggregator equipment has "selective" 10XXX capabilities, in that it can, without modification, block 10XXX dialing sequences that would result in billing to the originating phone without, at the same time, blocking 10XXX sequences that would be billed to the caller or an authorized third party. [19] Aggregators who use non-payphone equipment that has selective 10XXX capabilities must also unblock within six months or upon installation of such equipment, whichever is sooner. Aggregators who install equipment that is manufactured or imported on or after April 17, 1992 must unblock 10XXX access upon installation, because all such equipment must, under the Operator Services Act and our rules, have selective 10XXX capabilities. Other non-payphone aggregator equipment may require either hardware or software modifications or may have to be replaced before selective 10XXX access can be provided. We therefore direct aggregators using such equipment to unblock 10XXX access within eighteen months if they can, within the cost limit set out herein, modify their equipment to provide selective 10XXX access. All other aggregators must unblock 10XXX access by April 17, 1997, or when they install equipment with selective 10XXX capabilities, whichever is sooner. In addition, because our ultimate objective is to ensure that consumers have access to their preferred providers at all times, we are also requiring OSPs to establish an 800 or 950 access number, so that consumers will be ensured access of some type to all OSPs while 10XXX unblocking is proceeding.

a. 10XXX unblocking versus the establishment of 800 or 950 access

7. Several commenters gave broad support to our earlier tentative conclusion that universal establishment of 10XXX access should be our long-term goal. They contend primarily that consumers would be better able to choose freely among OSPs if the use of all established access methods were ensured.[20] A number of other commenters, however, opposed most proposals that 10XXX access be required, generally citing the inability of aggregators to prevent toll fraud associated with 10XXX access.[21] These latter commenters generally favored requiring all OSPs to establish 800 or 950 access numbers.

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comments filed in response to the *90-313 NPRM* and the *90-313 Further NPRM*, we will refer to "90-313 NPRM Comments," "90-313 NPRM Reply Comments," "90-313 FNPRM Comments," and "90-313 FNPRM Reply Comments," as appropriate.

[11] 47 U.S.C. § 226(e)(1).

[12] *NPRM*, 6 FCC Rcd at 1449 (citing 47 U.S.C. § 226(f)).

[13] *Id.* at 1449.

[14] *Id.* at 1449, 1453 (immediate unblocking for equipment with selective 10XXX capabilities; 12 months for all payphones; 36 months for other aggregator equipment). We noted the option of using toll restrictors with existing equipment to provide selective 10XXX access. *Id.* at 1449.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1450.

[18] *Id.*

[19] The "10XXX-1+" sequence is an example of the former, and "10XXX-0+" is an example of the latter.

[20] *E.g.*, 91-35 Comments of Ameritech at 1-2; 91-35 Comments of the American Telephone and Telegraph Co. (AT&T) at 3-4; 91-35 Comments of MCI Telecommunications Corp. (MCI) at 8 (also expressing certain reservations); 91-35 Comments of the Missouri Office of the Public Counsel at 1-2; 91-35 Comments of the Public Utility Comm'n of Texas at 3; 90-313 NPRM Comments of the Communications Workers of America at 8-9. In addition, a large number of individual consumers submitted comments that supported the unblocking of 10XXX access.

[21] *E.g.*, 91-35 Comments of the American Hotel and Motel

8. In the positions of the commenting parties, there is generally little overlap between those who favor requiring shortterm 10XXX unblocking[22] and those who favor requiring the establishment of 800 or 950 access by all OSPs.[23] Among the arguments in favor of 10XXX unblocking is the contention that the 10XXX code is an established access method that enhances consumer choice, a goal of the Operator Services Act. [24] Commenters opposed to mandatory 10XXX unblocking maintain that this access method can be employed to commit toll fraud, and they have submitted documentation to support this allegation.[25] These comments state that with the 10XXX dialing sequence, the OSP has the default option of billing the call to the originating telephone rather than the caller or an authorized third party. Thus," direct-dialed" 10XXX sequences, such as 10XXX-1+ (domestic) and 10XXX-011+ (international), may automatically be billed to the originating aggregator phone if not blocked in some way.[26] In addition, it is argued that even "authorized" 10XXX dialing sequences that should require the collection of billing information by the OSP's operator system, such as 10XXX-0 and 10XXX-01, can result in billing to the originating phone if not properly screened.[27] These commenters take the position that such fraud problems counsel against any 10XXX unblocking requirement. They maintain that current aggregator equipment cannot prevent such fraudulent use of the 10XXX dialing sequence[28] and that modification of equipment to process 10XXX calls selectively would be ineffective or prohibitively expensive.[29] They also claim that any 10XXX unblocking requirement would have to be accompanied by mandatory network services designed to control toll fraud.[30]

9. These latter parties argue that 800 or 950 access should be required of all OSPs because these access methods, in contrast to 10XXX, produce little or no risk of fraudulent use. According to the comments, callers using 800 or 950 access numbers must in all cases give billing information to the OSP and the OSP must then accept or reject the call based on this billing, information, with no option for billing to the originating phone.[31] It has also been argued that 800 or 950 access could be implemented within six months, while universal 10XXX unblocking could take years.[32] AT&T, the primary entity that would have to implement 800 or 950 access, opposes such a requirement. It contends that the implementation and operating costs would be very high and that service quality would be lower with such access than with 10XXX.[33] In addition, the United States Department of Justice views an 800/950 requirement as unwarranted, arguing that market forces should be relied upon to encourage the appropriate level of OSP access.[34]

10. Having examined the general arguments regarding the utility and necessity of the 10XXX access method, we find that 10XXX access must be allowed at aggregator locations within the time periods outlined below. The overriding consideration throughout our proceedings on operator services has been to ensure that consumers have the opportunity to choose freely among the available interstate operator services.[35] Requiring aggregators to allow 10XXX access will enhance consumer choice because consumers will then be able to use all established access methods to reach their OSPs of choice. The 10XXX access method is an efficient dialing sequence[36] and has met with a high degree of consumer acceptance, judging from the large number of consumer comments on the access issue. We think that consumers should be free to choose the 10XXX access method if they wish. Further, information voluntarily supplied to us by OSPs indicates that a number of them other than AT&T also make 10XXX codes available for consumer use.[37]

11. Our conclusion that all aggregators should eventually ensure the availability of 10XXX access is consistent with the Act's requirement that new aggregator equipment have 10XXX capabilities.[38] Commenters have argued that this statutory requirement is not intended to decide the access issue in this proceeding,[39] and, indeed, the Senate report on the Act confirms that it was not intended to do so.[40] It does not follow, however, as some have argued,[41] that Congress did not intend the 10XXX capabilities of

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Ass'n (AHMA) at 4 (favored 10XXX unblocking by attrition only); 91-35 Comments of the American Public Communications Council (APCC) at 70-71.

[22] *E.g.*, 91-35 Comments of AT&T at 6, 8-12 (unblocking should be required by December 31, 1991); 91-35 Comments of the Ameritech Operating Cos. at 2, 4; 91-35 Comments of the Public Utility Comm'n of Texas at 3-5, 8 (expressing reservations about requiring 800 or 950 access without clear evidentiary support).

[23] *E.g.*, 91-35 Comments of AHMA at 4 (favoring 800/950 requirement, with 10XXX unblocking by attrition only); 91-35 Comments of APCC at 70-71; 91-35 Comments of Intellicall at 5-7, 11 (favoring 800/950 requirement, with 10XXX unblocking by attrition only). Some parties, however, did favor requiring both 10XXX unblocking and the establishment of 800 or 950 access. *E.g.*, 91-35 Comments of United Telecommunications at 2-5.

[24] 91-35 Comments of AT&T at 3-4.

[25] 90-313 NPRM Comments of APCC at 41-46, Apps. A-J.

[26] 91-35 Comments of APCC at 51.

[27] 91-35 Comments of APCC at 51; 90-313 NPRM Comments of APCC at 53-58.

[28] 91-35 Comments of AHMA at 4.

[29] *Id.* at 4, 10, 11-12; 91-35 Comments of APCC at 50-52; 90-313 NPRM Comments of AHMA at 16 ($600 million in equipment upgrade costs for hotels).

[30] 91-35 Comments of APCC at 52-69. We note that AT&T is developing and will provide at no cost to local exchange carriers a new "split 1+" blocking feature. *See* 91-35 Reply Comments of AT&T at App. B, pp. 3-4.

[31] 90-313 NPRM Comments of APCC at 41.

[32] 91-35 Comments of the Competitive Telecommunications Ass'n (CompTel) at 9-10.

[33] 91-35 Comments of AT&T at 10 (implementation costs of $75 million, annual operating costs of up to $250 million; necessity of intervention by live operators, thus increasing handling time).

[34] 91-35 Reply Comments of the Department of Justice at 9.

[35] *NPRM*, 6 FCC Rcd at 1452; *90-313 Report and Order*, 6 FCC Rcd at 2762.

[36] The 10XXX codes require the dialing of only five digits to reach an OSP, rather the eleven or seven digits required with an 800 or 950 access number. In addition, callers using a 10XXX code can immediately dial in the called number, without waiting for a prompt. With 800 or 950 access, the caller must await a prompt before dialing in the called number.

[37] *See* Federal Communications Commission, News Release," Commission Releases Carrier Information in Consumer Education Program," mimeo no. 13180 (released May 21, 1991).

[38] 47 U.S.C. § 226(f) (equipment manufactured or imported after April 17, 1992); *see also* 47 C.F.R. § 68.318(d).

[39] *E.g.*, 91-35 Comments of APCC at 46-48.

[40] S. Rep. No. 439,101st Cong., 2d Sess. 20 (1990) (hereinafter *Senate Report)* .

[41] 91-35 Comments of APCC at 47.

this new equipment to be activated unless we so decide. In discussing the "new equipment" provision, the *Senate Report* states:

> In the long run, the equal access codes are likely to provide a higher quality of service to the customer than either "800" access or "950" access. It appears to be in the long-term interests of the public, including the manufacturing industry, that new equipment be programmed to recognize the "10XXX" access code. *This requirement will help speed the availability of the "10XXX" access code to all consumers.*[42]

While the *Senate Report* then goes on to specify that the statutory provision is "not intended to prejudge the FCC's decision" on the 10XXX unblocking issue, the explicit legislative view is clearly that the 10XXX code is a desirable access method and that consumers should in the future have this method available to them through the new, more sophisticated aggregator equipment. We conclude that during the period of transition to the eventual use of such equipment by all aggregators, 10XXX access should be available to the extent possible. To conclude otherwise would allow aggregators to continue blocking 10XXX access, thereby disrupting the smooth transition to the universal availability and use of 10XXX access intended by Congress and apparently desired by a large number of consumers.

12. Our conclusion that 10XXX access should be required for the benefit of consumers does not betoken a lack of concern over toll fraud associated with 10XXX calling. Under the Operator Services Act, we must, in our rule making proceedings, "require such actions. . . as are necessary to ensure that aggregators are not exposed to undue risk of fraud."[43] In response to our request for comments on the extent of the toll fraud problem, commenters have submitted extensive documentation showing that fraudulently placed 10XXX calls have resulted in billing to the originating aggregator telephones,[44] and even OSPs have acknowledged the problem.[45] Because of our concern about implementing universal 10XXX access without exacerbating the already serious toll fraud problem, we are adopting rules[46] that will provide consumers with universal 10XXX access within a reasonable period and will, at the same time, minimize the risk of toll fraud from such access. The phased 10XXX unblocking requirements described below are gauged according to equipment capabilities and modification costs so that most aggregators will have to unblock only when their equipment can, without major modifications, selectively process 10XXX dialing sequences to prevent fraudulent calling.[47] We are convinced that these measures will satisfy the statutory directive that we ensure that aggregators are not exposed to undue risk of fraud.

b. 10XXX unblocking requirements

i. Pay telephones

13. The *NPRM*, we proposed that 10XXX access be unblocked at payphones within one year. [48] Commenters have argued that 10XXX access presents toll fraud problems for payphones that can, in some cases, be more severe for payphones than for other aggregators because of the exposed nature of payphone equipment.[49] One commenter claims that equipment modification is8not sufficient to provide "safe" 10XXX access and contends that LEC blocking and screening services are necessary to prevent toll fraud.[50] It has also been argued that the proposed one-year unblocking schedule for payphones is unreasonably discriminatory because there is no reasonable rationale for requiring payphones to unblock 10XXX access in a shorter time than that proposed for other aggregator equipment.[51] According to one commenter, the "record contains no indication that pay telephones provide fewer consumer benefits than equipment at other aggregator locations, or that it is easier or less costly for payphone equipment to be made 10XXX compatible." [52] Other information in the record,[53] however, indicates that between sixty and eighty percent of the payphones now in use can provide "selective" 10XXX access, as defined above, with either minor or no modifications. According to some comments, the remaining payphones, at most forty percent of those in use, can be modified to provide selective 10XXX access at an average cost of $105.00 per phone. [54]

14. Under the modified Section 64.704(c)(1) that we now adopt, payphones will be required to allow 10XXX access within six months of the effective date of the new rules. The record has persuaded us that many payphones will need, at most, minor modifications to provide selective 10XXX access. The remaining payphones, while perhaps requiring more extensive modifications, can be selectively unblocked without unreasonable costs being incurred. Because of the details in the record regarding payphone modifications,[55] we find that unblocking within six months, rather than one year, is a reasonable requirement.

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[42] *Senate Report* at 20 (emphasis added).

[43] 47 U.S.C. § 226(g).

[44] 90-313 NPRM Comments of APCC at 41-46, Apps. A-J (estimated fraud experienced by competitive payphones in 1989 was $133 million). The documentation submitted by APCC does not, however, distinguish the allegedly fraudulent 10XXX calls from the allegedly fraudulent calls initiated via other dialing sequences. APCC has stated that after examination of telephone company records," many of the calls" were identified as having been initiated by means of a 10XXX code. *Id.* at 43 n. 42.

[45] *E.g.*, 91-35 Comments of AT&T at 5; 90-313 NPRM Reply Comments of AT&T at 7.

[46] The final rules are set out in Appendix B.

[47] *See* paras. 14-15, 18, 22-26, *infra*.

[48] *NPRM*, 6 FCC Rcd at 1449, 1453.

[49] 91-35 Comments of APCC at 49-54 & n. 49 ("clip-on" fraud that involves attaching calling devices close to the interface between the network and payphone); *see also* 91-35 Comments of Intellicall at 7-9.

[50] 91-35 Comments of APCC at 52-69.

[51] 91-35 Comments of Intellicall at 10-11.

[52] *Id.* at 10.

[53] 91-35 Comments of AT&T at 7; 90-313 NPRM Comments of the Operator Service Providers of America (OSPA) at Attachment A, p. 10.

[54] 90-313 NPRM Comments of OSPA at Attachment A, pp. 10-11. Other information in the record suggests modification costs in this general range, depending on the terms set by the manufacturer. *See* 90-313 NPRM Reply Comments of AT&T at Exhibit 3 (software and modifications may be provided at no cost).

[55] *See* 90-313 NPRM Reply Comments of AT&T at Exhibit 3.

15. Further, while we do not discount the possible value of LEC blocking and screening services in assisting in the prevention of toll fraud and encourage their availability and use to the extent they do provide such benefits, we conclude that it would be inappropriate to order all LECs to provide such services. The estimated costs associated with universally implementing such services vary widely: BellSouth, $16 million; Ameritech, $45 million; US West, $100 million.[56] LEC commenters have also indicated that implementation of certain services would take eighteen to twenty-four months,[57] and it would be unreasonable for payphones to continue blocking 10XXX access during that period when the payphones could be unblocked by other means much sooner. Based on the record before us, there are clearly many uncertainties associated with implementing central office blocking services, and it is not known how many aggregators would subscribe to them if low cost equipment modification might achieve the same end. Under these circumstances, it would be inappropriate to order LECs to provide these services, although we encourage LECs to offer the services to the extent that aggregators desire them.[58] Payphone owners, as well as other aggregators, are certainly free to subscribe to such services where they are available.[59]

16. Despite arguments to the contrary, we think it is reasonable to place payphones in a category separate from other aggregator phones. Unlike other aggregators such as hotels, hospitals, and universities, [60] payphone owners are primarily engaged in the business of providing telephone service. Payphone owners have a natural incentive to upgrade their equipment more frequently in order to remain technologically current and competitive in their industry, and, indeed, the record indicates that the life of payphone equipment is much shorter than that of other aggregator equipment. [61] Hence, it is rational to treat payphone owners differently from other aggregators because of the basic nature of their business and because their equipment is normally replaced much more often than that of other aggregators.

ii. Other aggregator equipment

17. In the *NPRM*, we proposed that aggregators using equipment with "selective" 10XXX capabilities be required to unblock 10XXX access immediately. [62] We also proposed a provision requiring all aggregators who install equipment manufactured or imported on or after April 17, 1992, to allow 10XXX access immediately upon installation of such equipment. [63] Parties have argued that certain existing equipment does have selective 10XXX capabilities, [64] while others contend that no such equipment exists. A [65] Some commenters [66] have also maintained that Section 226(f) of the Operator Services Act, which requires that new aggregator equipment have 10XXX capabilities, [67] does not require that the capabilities be utilized.

18. In Sections 64.704(c)(2) and 64.704(c)(3), we adopt the proposed rules with minor modifications. The record convinces us that some existing aggregator equipment can currently provide selective 10XXX access. We have already concluded with regard to payphones that blocking 10XXX access when much of the equipment has selective capabilities unreasonably deprives consumers of the use of an efficient access method. We apply the same principle to other aggregator equipment and require aggregators using nonpayphone equipment with selective capabilities to unblock 10XXX access. In order to provide a reasonable amount of time in which to comply, we are allowing aggregators who are now using equipment with selective capabilities six months to unblock. Non-payphone aggregators who install equipment with selective (capabilities after the effective date of these rules, however, must utilize those capabilities immediately upon installation, when activation of the capabilities will be relatively simple. We have explained above that the legislative history of the Act clearly shows Congressional intent that the 10XXX capabilities of aggregator equipment should be employed when they become available. [68] Hence, our unblocking requirement will apply to new equipment with selective 10XXX unblocking capabilities whether or not it was manufactured or imported after the statutory deadline for new equipment to have such capabilities.[69] In other words, the key factor in determining whether unblocking must occur immediately upon installation is whether the equipment has selective capabilities, not when it was manufactured or imported.

19. We also proposed in the *NPRM* that all other aggregator equipment not covered by preceding provisions be unblocked within three years and that equipment be

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[56] 91-35 Comments of BellSouth at 3; 91-35 Reply Comments of Ameritech at 6-7 (costs could increase depending on which switches were upgraded); 91-35 Comments of US West at 5.

[57] 91-35 Comments of BellSouth at 2-3 (12 months for AT&T switches only; 18 months for others); 91-35 Comments of Bell Atlantic at 2-3 (2 years); 91-35 Comments of US West at 5 (2 years).

[58] Central office services are already available or, at least, feasible at many locations. *See* 91-35 Comments of the NYNEX Telephone Cos. at 4; 91-35 Reply Comments of AT&T at App. B, pp. 3-4 (new blocking feature being developed and offered at no cost to LECs); 90-313 NPRM Comments of APCC at 55 n. 59; 90-313 NPRM Comments of AT&T at App. A, p. 3 (all LEC equal access end offices have blocking and screening capabilities). One variety of available screening service is "Billed Number Screening," which indicates any billing restrictions on a third number or called number to which the caller wishes to bill the call. 91-35 Comments of the NYNEX Telephone Cos. at 4.

[59] Because central office services, where available, or adjunct devices may make internal equipment modification unnecessary in unblocking 10XXX access, we have decided not to adopt the proposed Section 68.318(e), which would have required modification. Instead, we are simply requiring aggregators to unblock by whatever means they choose.

[60] *See 90-313 Report and Order*, 6 FCC Rcd at 2752 (examples of aggregators); *Senate Report* at 10 (same).

[61] *Compare* 91-35 Comments of Intellicall at 12 (three generations of payphone equipment deployed in six years) *with* 91-35 Comments of AHMA at 2 (average actual life of PBXs and related equipment is ten years).

[62] *NPRM*, 6 FCC Rcd at 1449, 1453 (proposed Section 64.704(c)(1)).

[63] *Id.* (proposed Section 64.704(c)(2)).

[64] 90-313 NPRM Reply Comments of AT&T at Exhibit 4, p. 1.

[65] 91-35 Comments of AHMA at 10.

[66] 91-35 Comments of APCC at 47; *see also* 91-35 Comments of Intellicall at (implication that Section 226(f) does not ensure eventually universal 10XXX access).

[67] 47 U.S.C. § 226(f) (aggregator equipment manufactured or imported after April 17, 1992).

[68] *See Senate Report* at 20.

[69] *See* 47 U.S.C. § 226(f).

modified if necessary.[70] Parties who supported these requirements offered evidence that current technology allows the unblocking of 10XXX access with, at most, minor modifications, at reasonable expense, and without undue risk of fraud. [71] The modifications contemplated by these parties for some equipment primarily involve software installation or reprogramming and the use of toll restrictors, which could be considered an external modification. [72] The costs of most software or toll restrictor modifications are between $200.00 and $3500.00 per aggregator location. [73] Individual toll restrictors are available at a cost of $216.00 for a singletrunk line unit and $300.00 to $350.00 for a four-trunk line unit, with several models available. [74] Installation costs for toll restrictors are generally no more than $200 per unit. [75] Several telephone instruments can be served by a single trunk line. [76]

20. Parties opposing our unblocking proposals contend that no equipment is currently capable of selective unblocking without modification [77] and that software changes would be unable to unblock 10XXX access fully. They argue that because of limited data handling capacity, the software could screen only a limited number of 10XXX codes, thus allowing "safe" 10XXX access to some but not all OSPs. [78] As for modification by the addition of adjunct devices such as toll restrictors, commenters have claimed that such devices are unavailable[79] or untested with most equipment [80] and are "wholly unsatisfactory" because their use would require the disabling of other processing features of the main equipment. [81] Opposing parties have cited cost figures of several thousand dollars per PBX or per aggregator location for certain types of modification. [82] More broadly, it has been alleged that a large amount of aggregator equipment simply could not be modified economically and would have to be replaced altogether. [83] These parties argue that because of the difficulties connected with unblocking, non-payphone aggregators should not be required to unblock 10XXX access prior to the time when they would voluntarily replace their equipment at the end of its useful life. [84] According to the record, the average life of non-payphone aggregator equipment is ten years. [85]

21. We do not view this latter "attrition" approach as sufficient to satisfy the Operator Services Act. Under the Act, we must adopt measures to ensure that consumers have universal access to their preferred OSPs "within a reasonable time."[86] An indefinite deadline based on natural attrition, or even a more concrete deadline based on the average equipment life of ten years, would not ensure access for consumers within a reasonable time.

22. Based on the record before us, we instead conclude that much aggregator equipment can provide selective 10XXX access within a reasonable time if modified at a moderate cost. Under Section 64.704(c)(4) as adopted, aggregators with equipment that can be modified within a specified cost limit[87] to provide selective 10XXX access must unblock within eighteen months. The record shows that for much non-payphone aggregator equipment, typically serving 120 or fewer telephone instruments, modification for selective 10XXX access can be accomplished for $1500.00 or less through either software modifications or the addition of adjunct devices such as toll restrictors. [88] For example, a 120-line PBX would have 12 outgoing trunk lines [89] and would therefore need three four-line toll restrictors. Each of these units would cost about $300.00, [90] accompanied by a $200.00 installation cost, [91] for a total of $1500.00 for the purchase and installation of the three units. Thus, using toll restrictors, the modification cost for each of the 120 lines connected to 82 telephone instruments would be $12.50 per line. Using the $12.50 per line cost as an approximate bench mark and allowing for the cost of other modification options, we find that aggregators must unblock 10XXX access if their equipment can be modified for no more than $15.00 per line [92] to selectively process 10XXX dialing sequences.

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[70] *NPRM*, 6 FCC Rcd at 1449, 1453 (proposed Sections 64.704(c)(4), 68.318(e)).

[71] 91-35 Comments of AT&T at 5; 90-313 NPRM Comments of OSPA at Attachment A, p. 8-11; 90-313 NPRM Reply Comments of AT&T at 7-8, Exhibits 2-4.

[72] 90-313 NPRM Comments of AT&T at App. A, p. 2-3; 90-313 NPRM Comments of OSPA at Attachment A, pp. 8-11; 90-313 NPRM Reply Comments of AT&T at Exhibits 2 and 4. The software available for use with some aggregator equipment can, it is argued, be programmed to screen a sufficient number of dialed digits to allow an authorized 10XXX dialing sequence while blocking an unauthorized sequence. Toll restrictors, which are separate devices that are connected to a PBX or payphone, analyze the digits sent out by the PBX or payphone and allow only calls involving authorized 10XXX dialing sequences to be completed.

[73] 90-313 NPRM Comments of OSPA at Attachment A, pp. 8-9; 90-313 NPRM Reply Comments of AT&T at Exhibits 2 and 4.

[74] 90-313 NPRM Comments of AT&T at App. A, p. 3; 90-313 NPRM Reply Comments of AT&T at Exhibit 2.

[75] During an *ex parte* presentation on June 13, 1991, AT&T represented this cost as typical for installation of a toll restrictor.

[76] 90-313 NPRM Comments of AT&T at App. A, p. 3. According to an *ex parte* presentation of AT&T on June 13, 1991, each outgoing PBX trunk line generally serves ten lines coming into the PBX from telephone instruments in, for example, hotel or hospital rooms.

[77] 91-35 Comments of AHMA at 10.

[78] 90-313 NPRM Comments of AHMA at 12, Exhibit 3; 90-313 NPRM Comments of OSPA at Attachment A, pp. 9, 12.

[79] 90-313 NPRM Comments of OSPA at Attachment A, p. 2.

[80] 91-35 Comments of APCC at 68.

[81] 91-35 Comments of CompTel at 24; 90-313 NPRM Comments of AHMA at 13.

[82] 91-35 Comments of AHMA at 12; 91-35 Comments of Telesphere at 12; 90-313 NPRM Comments of AHMA at 14.

[83] *E.g.*, 90-313 NPRM Comments of OSPA at Attachment A, p. 8; *see also* 91-35 Comments of AHMA at 11; 91-35 Comments of AT&T at 7.

[84] 91-35 Comments of AHMA at 2.

[85] *Id.*; *accord* 91-35 Comments of the American Council on Education, *et al.* at 13.

[86] 47 U.S.C. § 226(e)(1).

[87] We emphasize that these modification costs must be verifiable expenses due to the purchase of software or equipment and the accompanying installation or reprogramming. These costs may not include, for example, in-house costs such as the time a hotel manager spends determining what type of modification is necessary; this decision, while essential, is not part of the actual modification activity.

[88] 90-313 NPRM Comments of OSPA at Attachment A, pp. 8-10; 90-313 NPRM Reply Comments of AT&T at Exhibit 2.

[89] *See* note 76, *supra*.

[90] 90-313 NPRM Comments of AT&T at App. A, p. 3; 90-313 NPRM Reply Comments of AT&T at Exhibit 2.

[91] *See* note 75, *supra*.

[92] By "per line," we mean each line associated with an individual telephone instrument, not each trunk line.

23. We have chosen eighteen months [93] as an appropriate deadline because the record indicates that many LECs could have blocking and screening services in place by that time, thus allowing aggregators the option of selectively processing 10XXX access by using LEC services instead of by modifying their equipment. [94] As we have explained above, we do not think it appropriate to order all LECs to implement such services, given the uncertainties associated with implementation. But we have encouraged the LECs to offer the services to the extent that aggregators desire them, and, judging from the record, [95] we anticipate that many aggregators may indeed express such a preference. We are aware that this eighteen-month deadline allows non-payphone aggregators more time to unblock than is being afforded payphone owners, even though both types of aggregators may wish to use LEC services or may have to modify their equipment. As we have already noted, however, payphone owners are primarily engaged in a telecommunications business and will have a natural incentive to upgrade their equipment more frequently in order to remain competitive in their industry. Indeed, the record shows that new generations of payphone equipment are introduced every few years. [96] By contrast, nonpayphone aggregators, such as hospitals, universities, and hotels, will have little natural incentive to upgrade equipment regularly because their primary concern is not the provision of telephone service. [97] In addition, payphone aggregators will be better able to control the cost of equipment modifications than will nonpayphone aggregators. Payphones can be modified individually [98] and the total cost will therefore depend on the number of payphones the aggregator has chosen to deploy. Nonpayphone aggregators, however, such as hospitals or hotels using PBXs, will necessarily have to modify an entire system serving many telephone instruments. For the foregoing reasons, we think it reasonable to subject non-payphone aggregators to standards different from those applicable to payphone owners.

24. Finally, under Section 64.704(c)(5), we are requiring the unblocking of all aggregator equipment that is not covered by other provisions no later than April 17, 1997. The Internal Revenue Code assigns a five-year recovery period under the applicable depreciation systems for aggregator equipment.[99] Hence, much aggregator equipment manufactured or imported before April 17, 1992, the statutory deadline for new equipment to have 10XXX capabilities, [100] will be allowed at least a normal recovery period before equipment modification or replacement is required. We think that this unblocking schedule strikes the appropriate balance between the requirement that consumers have universal access within a reasonable time and our view that aggregators should not be burdened unfairly when they unblock 10XXX access.

25. We will expect each aggregator to determine which of the 10XXX unblocking requirements applies to its operations. Aggregators need not report to the Commission after making this determination but must simply unblock 10XXX access by the appropriate deadline. Similarly, we are not imposing any particular unblocking method, such as equipment modification. Instead, aggregators should, by the appropriate deadline, unblock via the method they think best fits their needs. For example, aggregators who can modify their equipment for $15.00 or less per line to provide selective 10XXX access must unblock within eighteen months, but they do not necessarily have to unblock by modifying their equipment. They can, if they wish, unblock by utilizing the available LEC central office services or any other method they might choose. In short, the rules adopted herein impose unblocking deadlines but not unblocking methods.

26. Under Section 64.704(c)(6), we have made it clear that our 10XXX unblocking requirements do not extend to those dialing sequences that are designed to result in billing to the originating phone. We do not, however, intend that aggregators be allowed to block all 10XXX dialing sequences that could, theoretically, be used to initiate a call that would be billed back to the originating phone. [101] Such a reading of this provision would make the other provisions pertaining to 10XXX access meaningless, because all 10XXX dialing sequences can, in theory, be used to initiate calls that would be billed back to the originating phone. By Section 64.704(c)(4), we only intend that aggregators be allowed to block those 10XXX dialing sequences, such as 10XXX-1+, that always result in billing to the originating telephone.

27. Having required the unblocking of 10XXX access, we must also adopt modifications to Section 64.704(b) of the rules to include 10XXX unblocking requirements among those covered by this provision. These modifications are required by Section 226(b)(1)(D), (E) of the Operator Services Act, 47 U.S.C. § 226(b)(1)(D), (E).

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[93] We therefore reject the three-year deadline proposed in the *NPRM*, which under this analysis would needlessly delay the availability of 10XXX access to consumers.

[94] As we have already noted, *supra* note 59, we are not adopting proposed Section 68.318(e), which would have required internal equipment modification. Aggregators do not necessarily have to modify their equipment internally in order to comply with our unblocking requirements but may, if they choose, employ network services or adjunct devices that prevent fraud associated with 10XXX calls, so long as they unblock 10XXX access for their customers.

[95] *See, E.g.*, 90-313 NPRM Comments of AHMA at 13-14, 19 (although LEC services may have problems, they will be necessary with any required unblocking of 10XXX-0+ dialing).

[96] 91-35 Comments of Intellicall at 12 (three generations of payphone equipment deployed in six years).

[97] *See, E.g.*, 91-35 Comments of AHMA at 14-16 (inexpert hotel operators are reliant on technology vendors regarding equipment capabilities and generally upgrade equipment only after its full average useful life); 91-35 Comments of the American Council on Education, *et al.* at 11-13 (many universities and colleges utilize equipment effectively for periods longer than the average useful life).

[98] As we have noted above, the record shows that the average modification cost is $105.00 per payphone. *See* 90-313 NPRM Comments of OSPA at Attachment A, pp. 10-11.

[99] I.R.C. § 168(e), (i).

[100] 47 U.S.C. § 226(f); *accord* 47 C.F.R. § 68.318(d).

[101] *See* 91-35 Comments of Intellicall at 13-14.

c. The role of 800 and 950 access numbers

28. In the *NPRM*, we also sought comment on requiring OSPs to establish an 800 or 950 access number as an interim access method during the period when universal 10XXX access is not yet available because of equipment or network limitations. Several parties supported this option rather than any 10XXX unblocking requirement because 800 and 950 access numbers apparently do not create the toll fraud risk associated with 10XXX dialing sequences.[102] AT&T, the primary entity that would have to establish 800 or 950 access, contends that a number of factors counsel against requiring such an access method. The costs for AT&T to establish 800 access[103] are allegedly up to $75 million for development and implementation and up to $250 million in annual operating expenses.[104] AT&T also claims that a live operator will be necessary for all calls initiated via an 800 number, thus resulting in service degradation in the form of increased call handling time.[105] The United States Department of Justice contends that such access should not be required by regulation if market forces do not induce OSPs to provide it. [106] One commenter favoring the establishment of 800 or 950 access argues that AT&T's cost estimates do not account for the additional revenue that 800 calls will produce because aggregators will have no need to block 800 access numbers because of toll fraud risks.[107] This commenter also contends that any operating costs for 800 access will be contingent on the amount of usage and that usage can be encouraged only at locations where 10XXX access is not available.[108]

29. We conclude that the establishment of 800 or 950 access by all OSPs is necessary to provide an access method for consumers at aggregator locations where 10XXX access is temporarily unavailable during the six-year transition to full unblocking adopted herein. Moreover, the use of 10XXX access is not technically possible in non-equal access areas of the country. If we fail to provide a means of access for consumers in either situation, our policies would leave a significant number of consumers without access to all OSPs. This result would clearly be inconsistent with the considerations underlying the Operator Services Act. Further,800 access is widely used and understood, and AT&T, a primary provider of 800 services, faces no unreasonable barriers to its implementation. Costs of implementation will, as commenters note, be partially offset by revenues from 800 calls that will be directed to AT&T instead of blocked. In addition, operating costs can, we think, be minimized by marketing this access method effectively, so as to discourage unnecessary use where 10XXX access is available. OSPs can also recover any increased operating costs through rates or charges gauged to the cost of providing the access. We are requiring the establishment of 800 or 950 access within six months because the record shows that AT&T, the primary subject of this requirement, has indicated that it will be able to implement such access within this time period.[109]

30. Some LECs that provide interstate operator services in limited situations argue that they should not be required to establish 800 or 950 access.[110] We agree because, as they note, LEC operators are available through "0-" dialing. Intellicall also argues that "store and forward" payphone owners who are considered OSPs should not be required to establish 800 or 950 access because these OSPs provide operator services only at individual payphone locations.[111] We agree in principle that such OSPs should not have to establish 800 or 950 access. We conclude, however, that it is more prudent to require such OSPs to file waiver requests, so that we may consider the individual circumstances of all "store and forward" OSPs, not simply payphones.

d. Additional issues

31. Parties also filed comments regarding aggregator status,[112] transfer services,[113] billed party preference,[114] "0+" dialing as being in the "public domain,"[115] relief from toll fraud liability,[116] and waivers[117] of any 10XXX unblocking requirements that we might adopt. [118] We have already addressed questions of aggregator status in

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[102] *E.g.*, 90-313 NPRM Comments of APCC at 40.

[103] AT&T claims that its network architecture precludes the use of 950 access. 91-35 Comments of AT&T at 9.

[104] 91-35 Comments of AT&T at 10.

[105] *Id.* AT&T explains that its network architecture currently "assigns responsibility for its operator-handled and calling card calls to its operator systems. These systems combine the hardware and software necessary to provide the specialized capabilities required for these services. However, responsibility for traffic using the 1-800 prefix is assigned to the Originating Screening Offices (OSO) software located in a different system. Because of the design of AT&T's operator systems, all operator service calls originated using an 800 number would have to be handled on a manual basis. . . . The customer would be required on all occasions to deal with the operator." 90-313 NPRM Comments of AT&T at App. C, p. 1.

[106] 91-35 Reply Comments of the Department of Justice at 8-11.

[107] 91-35 Comments of CompTel at 12-13.

[108] *Id.*

[109] 91-35 Comments of AT&T at 9 (only 800 access, not 950, could be implemented in six months); 91-35 Comments of CompTel at 10; *see also Senate Report* at 22 n. 20.

[110] *E.g.*, 91-35 Comments of Bell Atlantic at 3-4.

[111] 91-35 Comments of Intellicall at 4 n. 5.

[112] 91-35 Comments of the Arizona Dep't of Corrections at 2 (need to distinguish between public access and controlled access payphones at correctional institutions); 91-35 Comments of the American Council on Education, *et al.* at 6-9 (universities and colleges as aggregators); 91-35 Reply Comments of Ohio University at 1.

[113] *E.g.*, 91-35 Comments of CompTel at 20-21. A "0-" call occurs when the customer dials only the "0" digit and then waits for assistance from the LEC operator. With a "0-" transfer service, the LEC operator would transfer the "0-" call to the consumer's requested OSP. *See NPRM*, 6 FCC Rcd at 1450. OSPs wishing to receive such transferred calls would usually have to subscribe to the LEC service.

[114] *E.g.*, 90-313 NPRM Comments of Bell Atlantic at 2-4.

[115] *E.g.*, 91-35 Comments of MCI at 3-7.

[116] 91-35 Comments of APCC at 73-75; 91-35 Comments of Intellicall at 13-16.

[117] *E.g.*, 91-35 Comments of United Telecommunications at 5-6; 90-313 NPRM Comments of OSPA at 20.

[118] We also note that parties have commented in a general way on whether our rules should preempt state requirements regarding operator service access. *E.g.*, 91-35 Comments of the National Ass'n of Regulatory Utility Comm'rs at 7-8. We have recently addressed the issue of preemption as it involves the Operator Services Act. *See* Operator Service Providers of America, Memorandum Opinion and Order, FCC 91-185, para. 14 (released July 11, 1991).

the *90-313 Report and Order* [119] and will not revisit that issue here. We think that "0-" transfer services may be useful as interim access methods in nonequal access areas, but we do not see such services as providing a broad solution to access problems, nor does the Operator Services Act treat them as an acceptable overall option.[120] As for the comments regarding billed party preference," 0+" dialing, and relief from toll fraud liability, these issues are not properly before the Commission in this proceeding. Regarding waivers, we view the myriad types of aggregator equipment and the variable and numerous aggregator situations as posing significant problems for the formulation of meaningful generalized waiver standards applicable to our 10XXX unblocking requirements.[121] This record does not, and could not, disclose all of the many permutations involving aggregators and their equipment. We therefore see no course other than to consider waiver requests on a case-by-case basis under the appropriate legal standards.[122]

B. *Payphone Compensation*

1. Statutory requirements and proposed options

32. Under the Operator Services Act, we must consider "the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones." [123] Currently, payphone owners may receive revenue from coin payments for local calls, from resold "1+" toll calls, and from commissions paid by the presubscribed OSP. They apparently receive no compensation when a caller initiates a call with an access code. [124] In the *NPRM*, we first asked for comment on whether we should declare that compensation will not be prescribed, an option under the statute. We also sought comment on compensation through pooling mechanisms and through direct, individual billing arrangements between competitive public payphone owners and OSPs to which the access code calls go. Among the other issues we raised for comment were the appropriate compensation charge or formula and which payphones would be eligible for compensation.

2. Discussion

a. Whether to order compensation

33. The threshold issue for our consideration is whether to prescribe compensation at all. Some commenters argue that equity requires that payphone owners be compensated for the use of their equipment for access code calls. The commenters cite as reasons the payphone owners' investment in equipment and their operating expenses, and note that access code calls impose an opportunity cost on payphone owners.[125] They also maintain that payphone owners should not be penalized for complying with unblocking requirements and that compensation will provide fairer competitive conditions in the payphone market.[126] Other parties, however, have commented that the record does not support a conclusion that compensation is in the public interest: there is no evidence, for example, that compensation would produce improvements in rates and services or that payphones could not continue to compete without compensation.[127] Several commenters argue that competitive payphone owners already receive sufficient revenue from other sources, such as advance payment for local calls, commissions from presubscribed OSPs, and income from the resale of services. [128]

34. We conclude that considerations of equity require us to prescribe compensation. The Operator Services Act and our rules require that payphone owners allow consumers to use payphone equipment for access code calls.[129] By providing the equipment through which the consumer initiates calls to the OSP of choice, the payphone owner is benefiting the public but is not guaranteed any revenue for access code calls. In addition, the payphone owner must expend financial resources to maintain the equipment. It is only fair that these costs be

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[119] *90-313 Report and Order*, 6 FCC Rcd at 2748-53.

[120] *See* 47 U.S.C. § 226(e)(1).

[121] For example, it is alleged that the use of a toll restrictor with some aggregator equipment would require the removal of "important software features" of that equipment. *See* 90-313 NPRM Comments of AHMA at 13 (Automatic Route Selection feature would be disabled by installation of toll restrictor). Such an allegation, even if true, does not provide information specific enough to support a waiver determination. The cost and effectiveness of other unblocking options as they would be utilized with a particular piece of equipment would have to be considered in making such a determination.

[122] Rules may be waived if there is "good cause" to do so. *See* 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC,418 F. 2d 1153, 1159 (D.C. Cir. 1969); *see also* Northeast Cellular Tel. Co. v. FCC,897 F. 2d 1164, 1166 (D.C. Cir. 1990).

[123] 47 U.S.C. § 226(e)(2). The language of the Act contemplates that prescribed compensation would cover all calls to non-presubscribed OSPs initiated via any access method, including 10XXX,800, and 950. *See Senate Report* at 19. The clear language also indicates that any call handled by the presubscribed OSP, even if initiated via an access code, would not be compensated under a prescribed system but would be dealt with in the agreement between the payphone owner and the presubscribed OSP.

[124] *NPRM*, 6 FCC Rcd at 1450.

[125] 91-35 Comments of APCC at 1-2, 9; 91-35 Comments of the City of New York Dep't of Telecommunications and Energy at 8; 91-35 Reply Comments of the California Payphone Ass'n at 3. The alleged "opportunity cost" is the revenue lost when a caller cannot make a presubscribed or other compensated call because another caller is making an uncompensated access code call.

[126] 91-35 Comments of the City of New York Dep't of Telecommunications at 8; 91-35 Reply Comments of the Illinois Commerce Comm'n at 5; 91-35 Reply Comments of the California Payphone Ass'n at 3.

[127] *See* 91-35 Comments of AT&T at 12; 91-35 Comments of the National Telephone Cooperative Ass'n at 4; 91-35 Reply Comments of MCI at 7; 9135 Reply Comments of Pacific Bell at 2.

[128] 91-35 Comments of AT&T at 12-14; 91-35 Comments of United Telecommunications at 10; 91-35 Comments of NYNEX at 5-6; 91-35 Reply Comments of Pacific Bell at 2-3; 91-35 Reply Comments of the California Public Utilities Comm'n at 4.

[129] We explicitly reject the argument, however, that compensation is justified because competitive payphone owners can no longer block calls that do not produce revenue. *See* 91-35 Reply Comments of the United States Dep't of Justice at 12 n. 25. Even before the passage of the Operator Services Act and the adoption of our implementing regulations that prohibited call blocking, such blocking was an unreasonable practice that thwarted consumer choice and thereby hindered the operation of a truly competitive operator services marketplace.

shared by consumers who benefit from the ability to make access code calls and by OSPs who derive revenue from the calls. While the Operator Services Act does not allow us to prescribe compensation in the form of advance payment from consumers, a consumer who makes an access code call will, of course, indirectly compensate the payphone owner through rates paid to the OSP who handles the call and who will compensate the payphone owner directly.

b. The compensation mechanism

35. A number of details about the compensation mechanism must be determined: the types of payphones to include in the compensation scheme, the types of calls that are compensable, the mechanism for transferring compensation from the OSP to the payphone owner, and the compensation charge or formula. The legislative history explicitly addresses the question of which payphones to include. In discussing the compensation issue, the *Senate Report* states that the term "competitive pay telephones" refers to "those payphones not owned or provided by the telephone companies." [130] We see no persuasive reason to depart from this clear legislative intent. [131]

36. Regarding the types of calls that are compensable, APCC argues that all 800 calls should be included, including those going directly to a subscriber that is not an OSP. [132] Quoting the Act, APCC maintains that such calls are "routed to providers of operator services that are other than the presubscribed OSP" and should therefore be compensated. We disagree. The *Senate Report* states that we must "consider the need to prescribe compensation for independent payphone owners for calls made *using a carrier-specific access code*."[133] We do not think that a call placed via an 800 number to a retail outlet, for example, is a call involving a "carrier-specific access code" the 800 number in question is that of the end user and not simply associated with an OSP or carrier, and it is also not an "access code" as defined by the Act and our rules. [134] In considering the compensation issue, our goal is to ensure that payphone owners are not unfairly deprived of a revenue-making opportunity when consumers use payphone equipment to exercise their right of choice among OSPs. It is not our intention to ensure compensation for every conceivable type of call. In addition, our refusal to consider "non-access" 800 calls compensable will prevent the improper use of 800 numbers to increase compensation. [135]

37. With paragraphs 37 through 44, we are adopting a Further Notice of Proposed Rule Making in order to seek additional comment on certain issues regarding the compensation mechanism and amount. We tentatively concluded in the *NPRM* that only completed calls would be compensable.[136] APCC argues that uncompleted access code calls should also be compensated to some extent. [137] According to APCC, the originating LEC central office does not, for some access code calls, receive answer supervision indicating completion of the call. Instead, the LEC is only signalled that the OSP has received the call and does not know whether the called party has answered. Another commenter, however, maintains that such calls should not be compensable because they generate no revenue for other entities. [138] We conclude that uncompleted calls should not be compensable as a general rule. It would not be equitable to require OSPs to compensate payphone owners for calls that generated no revenue for the OSPs. In addition, purposeful uncompleted calls could be used improperly as a way to increase compensation. We therefore reaffirm our earlier tentative conclusion that only completed calls are compensable. But we think it would likewise be inequitable for payphone owners to receive no compensation for a completed call simply because completion of the call could not be determined at the originating LEC central office. The current record does not contain any reliable method for segregating compensable completed calls from uncompleted calls. [139] We therefore encourage parties to suggest such methods as part of their comments on compensation mechanisms.

38. We next address the issue of what mechanism should be used to transfer compensation from the OSP to the payphone owner. As noted above, we sought comment in the *NPRM* on pooling mechanisms and direct billing arrangements. In addition, APCC, the payphone association, proposed its own compensation plan: the LECs would collect information about compensable calls, credit the payphone owners on their monthly bills the appropriate compensation amount based on a formula determined by the Commission, and then collect the revenue necessary to cover the compensation amounts from OSPs through a revised carrier common line (CCL) charge that would apply to all interstate calls. [140]

39. First, we will consider the pooling option. As many parties have commented, [141] a pooling mechanism would be costly and administratively complex, especially given the large number of expected participants. Beyond such comments, the record contains virtually no evidence to

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[130] *Senate Report* at 19 n. 17.

[131] Hence, to the extent that telephone company payphone costs remain part of the rate base, such payphones will not be eligible for participation in the compensation mechanism. In addition, we decline to address the issue of whether aggregators other than competitive public payphone owners should be compensated for access code calls. *See* 91-35 Comments of the Airport Operators Council International at 2-12. This issue was not raised by the Operator Services Act or the *NPRM* and is therefore outside the proper scope of this proceeding.

[132] 91-35 Comments of APCC at 37-39.

[133] *Senate Report* at 19 (emphasis added).

[134] 47 U.S.C. § 226(a)(1); 47 C.F.R. § 64.708(a).

[135] It has been argued that a payphone owner could attach an autodialer to a payphone and have it place repeated 800 calls, which are free to the caller, in order to increase the amount of compensation that the payphone owner receives. *See* 91-35 Reply Comments of United Telecommunications at 6.

[136] *NPRM*, 6 FCC Rcd at 1454 n. 31.

[137] 91-35 Comments of APCC at 39-40.

[138] 91-35 Reply Comments of Pacific Bell at 6.

[139] APCC has suggested that a call for which no answer supervision has been received should become compensable after a certain time limit. *See* 9135 Comments of APCC at 39-40. No support is offered, however, for any particular time limit.

[140] 91-35 Comments of APCC at 23-28.

[141] 91-35 Comments of AT&T at 14-15; 91-35 Comments of Bell Atlantic at 4; 91-35 Comments of CompTel at 31; 91-35 Comments of Pacific Bell at 3; 91-35 Comments of United Telecommunications at 11-14; 91-35 Reply Comments of the Illinois Commerce Comm'n at 6.

support this option. Thus, we tentatively find that pooling does not appear to be an appropriate compensation mechanism to adopt.

40. Second, we will consider APCC's proposed compensation mechanism, which would utilize the LEC call accounting and access charge systems. APCC emphasizes that this mechanism would have the advantage of employing existing systems for the calculation, collection, and disbursement of compensation, thus avoiding the costs and complexities inherent in the creation of an entirely new compensation system. [142] While some commenters supported this proposal, [143] several parties, including LECs, criticized it as an inappropriate administrative burden on the LECs and an improper use of the access charge system. [144] Although we see the advantages of a compensation mechanism that employs existing systems, we find the objections to be valid. The APCC system would inappropriately spread the cost of payphone compensation over all interstate calls via carrier common line (CCL) charges, thus forcing all interstate callers to bear a cost associated only with access code calls. We also view the burden on the LECs as being misplaced, in that they would be responsible for channeling compensation to their competitors in the payphone marketplace and would therefore be a focal point of any disputes over compensation between the OSPs and the payphone owners. Given the problems with the APCC proposal evident from the existing record, we cannot endorse that proposal.

41. The remaining mechanism for our consideration is direct billing between payphone owners and OSPs. Some commenters have favored this mechanism as being simple and inexpensive. [145] Other parties, however, have criticized direct billing arrangements as very inefficient, involving hundreds of individual contractual arrangements and possibly engendering multiple disputes. [146] We tentatively conclude that direct billing arrangements should be utilized in the compensation scheme that we prescribe. These arrangements have the unique advantage of necessarily involving only the entities that benefit from the access code calls -- the OSPs -- and the entities that benefit from the resulting compensation -- the payphone owners. Because only these parties must be involved, there will be an incentive to maintain harmonious, workable relationships that might be missing with any mechanism that required third parties to intervene. Third parties such as LECs, who benefit directly from neither the calls nor the compensation, will not be burdened with administrative tasks. In addition, these individualized arrangements will offer a great degree of flexibility to the entities that enter into them to devise the most efficient and reliable implementation mechanisms.

42. Although we have tentatively concluded that direct billing is the most appropriate compensation mechanism, we anticipate that industry participants may wish to develop alternative mechanisms. We are therefore amenable to any such proposals and seek comment on what compensation mechanism we should finally adopt.

43. Finally, we turn to the issue of how compensation should be calculated. Although we did receive comments that proposed very general methods for calculating the appropriate compensation charge, [147] we find the record insufficient to support a final determination of this issue. [148] The record contains no data that are specific or comprehensive enough to support any decision on what compensation charge or formula should be prescribed. We tentatively conclude, however, that a per call charge would be preferable to a per minute charge because a per call charge would allow simplified accounting and monitoring methods. With a per call, rather than a per minute, charge, only the completion of a call, not its length, would have to be monitored and verified. We seek comment on this tentative conclusion and ask interested parties to suggest alternatives to per call compensation. [149]

44. One example of a potential method for determining the appropriate compensation amount is one using publicly available sources and taking as its basis the average charge for a local payphone call. Our data show that in 1990, the average charge for a same-zone daytime business call was $0.09 per call. [150] At the end of that year, the average charge for a five-minute local payphone call was $0.23. [151] This charge includes compensation for the use of the payphone instrument, the local calling, and the collection of the payment. The typical local payphone call is "sent paid," i.e., coins are deposited at the beginning of the call. Thus, the expense of collecting coins must be considered, including the expense of a coin collector, the maintenance of the coin mechanism, and any vandalism induced by the presence of coins. We do not have hard data on the extent to which these costs differ from the billing and collection costs associated with direct compensation from long distance carriers. We estimate that these excess costs are at least ten percent of gross revenue for each call, which would be $0.02. Using these data, one can calculate a charge of $0.12: this amount is the charge for the average local payphone call ($0.23) minus the average charge for a same-zone daytime business call ($0.09) minus the estimated coin collection expense ($0.02). We emphasize that we are using these figures only

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[142] 91-35 Comments of APCC at 23.

[143] *E.g.*, 91-35 Reply Comments of the California Payphone Ass'n at 2.

[144] 91-35 Comments of the National Telephone Cooperative Ass'n at 4; 91-35 Reply Comments of Ameritech at 10; 91-35 Reply Comments of BellSouth at 2, 5; 91-35 Reply Comments of MCI at 7.

[145] 91-35 Comments of CompTel at 31; *cf.* 91-35 Comments of Pacific Bell at 3 (describing intrastate compensation system that appears to be similar to direct billing in some respects); 91-35 Reply Comments of BellSouth at 5 (several direct compensation plans are feasible).

[146] 91-35 Comments of APCC at 33-34; 91-35 Reply Comments of United Telecommunications at 7.

[147] *E.g.*, 91-35 Comments of Bell Atlantic at 5; 91-35 Comments of APCC at 43-45.

[148] *See* 91-35 Comments of APCC at 45 (urging immediate decision but suggesting that FCC should request additional data for development of compensation rates); 91-35 Reply Comments of AT&T at 14-15 (information in record is not specific enough).

[149] Because we have found that the record, at this time, cannot support final determinations regarding the compensation mechanism and amount, we likewise conclude that it would be inappropriate to prescribe an interim compensation scheme, which would require virtually identical determinations.

[150] J. Lande, Industry Analysis Division, Federal Communications Commission, "Telephone Rates Update" at 15, Table 5 (dated January 30, 1991).

[151] *Id.*

as examples and are not proposing at this time any particular methodology or amount. We seek comment generally on what compensation amount should be prescribed and on what methodology should be used to calculate that amount.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

45. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

46. **Need and purpose of this action.** This Report and Order and Further Notice of Proposed Rule Making adopts regulations to implement the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435,104 Stat. 986 (1990). The adopted rules are intended to protect consumers from unfair and deceptive practices related to their use of operator services to place interstate telephone calls and to ensure that consumers have the opportunity to make informed choices in making such calls.

47. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.** Comments were submitted in response to the Initial Regulatory Flexibility Analysis by the American Hotel and Motel Association. [152] These comments describe the number of lodging properties in the United States and their sizes, rates, and number of employees, and note that the burden of proposed equipment modification requirements would fall most heavily on smaller businesses.

48. **Significant alternatives considered and rejected.** The initiating documents in this proceeding offered many proposals. The commenters supported the basic thrust of this proceeding, but many suggested alternatives to the Commission's proposals. The Commission considered all of the alternatives presented in the proceeding and considered all of the timely filed comments directed to the various issues that were raised. After carefully weighing all aspects of the issues and comments in this proceeding, the Commission has taken the most reasonable course of action under the mandate of the Operator Services Act.

V. FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

49. **Reason for action.** Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, which requires a rule making proceeding on pay telephone compensation issues, the Commission is issuing this Further Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

50. **Objectives.** The objective of this Further Notice of Proposed Rule Making is to solicit the comments necessary to supplement the record in this proceeding so that the Commission can reach final determinations on certain issues regarding pay telephone compensation.

51. **Legal basis.** Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151,154(i), 154(j), 201-205, 218, 226, 303(r).

52. **Description, potential impact, and number of small entities affected.** The proposed compensation scheme will require operator service providers to compensate competitive public payphone owners for calls not routed through the presubscribed provider and may require competitive public payphone owners to bill operator service providers directly. Payphone owners and operator service providers that are small entities may feel some economic impact due to these requirements.

53. **Reporting, recordkeeping, and other compliance requirements.** The proposed rules contain no reporting or recordkeeping requirements.

54. **Federal rules that overlap, duplicate, or conflict with the Commission's proposal.** None.

55. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives.** We shall consider any alternatives suggested in comments that are consistent with the requirements of the Operator Services Act.

56. **Comments are solicited.** We request written comments on this Further Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

VI. EX PARTE REQUIREMENTS

57. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

VII. CONCLUSION

58. With this Report and Order and Further Notice of Proposed Rule Making, we adopt rules that will facilitate consumer choice by requiring the unblocking of 10XXX access over time at aggregator locations and will further ensure consumer access by requiring all operator service providers to establish an 800 or 950 access number within six months. Specifically, aggregators who provide payphones must unblock 10XXX access within six months of the effective date of these rules. Aggregators who use nonpayphone equipment that can selectively process 10XXX dialing sequences must unblock within six months or upon installation of such equipment, whichever is sooner. Aggregators who install equipment manufactured or imported on or after April 17, 1992, must unblock 10XXX access upon installation of such equipment. Those aggregators who can modify their equipment for no more than $15.00 per line to selectively process 10XXX access must unblock within eighteen months. Finally, all other aggregators must unblock 10XXX access

[152] 91-35 Comments of AHMA at 18.

no later than April 17, 1997. In addition, we have determined that competitive public payphone owners should be compensated for access code calls, and we seek additional comment on the mechanism for transferring compensation from OSPs to payphone owners and on the appropriate charge that we should prescribe as compensation.

VIII. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 226, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151,154(i), 154(j), 201-205,226, that Part 64 of the Commission's rules, 47 C.F.R. Part 64, IS AMENDED as set forth in Appendix B below.

60. IT IS FURTHER ORDERED that the Motion to Accept Late Filed Comments filed by Big Apple Telecommunications on April 15, 1991; the Motion for Leave to File Comments filed by the Arizona Corporation Commission on April 15, 1991; the Motion to File Reply Comments Instanter filed by the Illinois Commerce Commission on April 29, 1991; the Motion for Leave to File Reply Comments Out of Time filed by the United States Department of Justice on May 17, 1991; and the Motion for Leave to Submit LateFiled Reply Comments filed by Robert C. Wilcox on June 18, 1991, ARE GRANTED.

61. IT IS FURTHER ORDERED that this Report and Order will be effective thirty (30) days after publication of a summary thereof in the Federal Register.

62. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205,226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151,154(i), 154(j), 201-205,226, 303(r), that a FURTHER NOTICE OF PROPOSED RULE MAKING IS ISSUED.

63. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, that all interested parties may file comments on the compensation issues in paragraphs 37 through 44 on which comment is specifically sought by **November 7, 1991** and reply comments by **December 9, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

64. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

65. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Further Notice, including the Further Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Further Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
List of Commenters in CC Docket No. 91-35

Comments

Ad Vantage Telco, Inc.
Airport Operators Council International
Alabama Public Services Commission
All-Tech Telecom, Inc.
Americall Systems of Louisville, et al.
American Council on Education, et al.
American Hospital Association (AHA)
American Hotel & Motel Association
American Public Communications Council
American Telephone and Telegraph Co. (AT&T)
Ameritech Operating Companies
Arizona Corporation Commission
Arizona Department of Corrections
Bell Atlantic Telephone Companies
BellSouth Telephone Companies
Big Apple Telecommunications, Inc.
Capital Network System, Inc.
Citizens Utilities Company
Cleartel Communications, Inc.
Colorado State University
Competitive Telecommunications Association
Denison University
Fairfax County Department of Consumer Affairs
Firstel Systems, Inc.
Greater Orlando Aviation Authority
Healthcare Information & Management Systems Society of the AHA
Intellicall, Inc.
International Telecharge, Inc.
Litel Communications
MCI Telecommunications Corporation
Missouri Office of Public Counsel
MLD Long Distance, Inc.
National Association of Regulatory Utility Commissioners

National Association of Consumer Agency Administrators
National Telephone Cooperative Association
NCR Corporation
New York Department of Public Service
New York Department of Telecommunications
Nycom Information Services, Inc.
NYNEX Telephone Companies
O'Brien Engineering, P. C.
Omniphone, Inc.
Pacific Bell and Nevada Bell
Pacific Lutheran University
Patricia's Enterprise
Presbyterian College
Public Utility Commission of Texas
Rochester Telephone Company
SDN User's Association, Inc.
Southwestern Bell Telephone Company
State University of New York
Stationers Distributing Company, Inc.
Telesphere Communications, Inc.
U.S. Long Distance Corporation
United States Telephone Association
United Telecommunications, Inc.
US West Communications, Inc.
Value-Added Communications, Inc.
Vermont Structural Slate Company, Inc.

Reply Comments

Ad Vantage Telco, Inc.
American Council on Education, et al.
American Hotel & Motel Association
American Public Communications Council
Ameritech Operating Companies
AT&T
Bell Atlantic Telephone Companies
BellSouth Corporation
California Payphone Association
California Public Utilities Commission
Capital Network System, Inc.
Competitive Telecommunications Association
Fremont Mutual Insurance Company
Greater Orlando Aviation Authority
Healthcare Information & Management Systems Society of the AHA
Illinois Commerce Commission
Intellicall, Inc.
Iowa Utilities Board
Kentucky Public Service Commission
MCI Telecommunications
Missouri Public Service Commission
Mitel, Inc.
National Telephone Cooperative Association
New Jersey Board of Public Utilities
New York Department of Public Service
NYNEX Telephone Companies
Ohio University
Oregon Department of Justice
Pacific Bell and Nevada Bell
Southwestern Bell Telephone Company
Telesphere Communications, Inc.
Tennessee Public Service Commission
United States Department of Justice
United States Telephone Association
United Telecommunications, Inc.
US West Communications
Wilcox, Robert C.

APPENDIX B
RULES

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. § 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. §§ 201, 218, 226, unless otherwise noted.

2. Section 64.704 is amended by revising paragraph (b) and by adding paragraphs (c) and (d) to read as follows:

§ 64.704 Call blocking prohibited.

*****

(b) Each provider of operator services shall:

(1) Ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraphs (a) and (c) of this section; and

(2) Withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator is blocking access to interstate common carriers in violation of paragraphs (a) or (c) of this section.

(c) Each aggregator shall, by the earliest applicable date set forth in this paragraph, ensure that any of its equipment presubscribed to a provider of operator services allows the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(1) Each pay telephone shall, within six (6) months of the effective date of this paragraph, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(2) All equipment that is technologically capable of identifying the dialing of an equal access code followed by any sequence of numbers that will result in billing to the originating telephone and that is technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving equal access codes, shall, within six (6) months of the effective date of this paragraph or upon installation, whichever is sooner, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(3) All equipment or software that is manufactured or imported on or after April 17, 1992, and installed by any aggregator shall, immediately upon installation by the aggregator, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(4) All equipment that can be modified at a cost of no more than $15.00 per line to be technologically capable of identifying the dialing of an equal access code followed by any sequence of numbers that will result in billing to the originating telephone and to be technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving equal access codes, shall, within eighteen (18) months of the effective date of this paragraph, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(5) All equipment not included in paragraphs (c)(1), (c)(2), (c)(3), or (c)(4) of this section shall, no later than April 17, 1997, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(6) This paragraph does not apply to the use of equal access code dialing sequences that result in billing to the originating telephone.

(d) All providers of operator services shall establish an "800" or "950" access code number within six (6) months of the effective date of this paragraph.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-229

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Potosi and Waynesville, Missouri) — RM-7761

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: July 29, 1991; Released: August 9, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Prime Time Radio ("petitioner") requesting the substitution of Channel 249C3 for Channel 249A at Potosi, Missouri. Petitioner also requests modification of its construction permit for Station KWVB to specify operation on the higher class channel. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Potosi with a wide coverage area FM service. Petitioner notes that Channel 249C3 can be allotted to Potosi, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 250A is substituted for Channel 249A at Waynesville, Missouri.[1] Channel 249A at Waynesville is presently licensed to Station KFBD-FM. The proposed substitution at Waynesville can be accomplished in compliance with the minimum distance separation requirements at the current site for Station KFBD-FM.[2] We shall also propose to modify the license of Station KWVB, Channel 249A, to specify operation on Channel 249C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it would reimburse the affected station for the costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station KFBD-FM for the reasonable costs in changing frequency.

4. In view of the above, we believe the public interest would be served by proposing the allotment of Channel 249C3 to Potosi, Missouri, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Potosi, Missouri	249A	249C3
Waynesville, Missouri	249A, 272A	250A, 272A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, BD, Inc., the licensee of Station KFBD-FM, Waynesville, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 250A in lieu of Channel 249A.

6. Pursuant to Section 1.87 of the Commission's Rules, BD, Inc., may, not later than **September 30, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on BD, Inc. to furnish additional information. If BD, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, DB, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public's interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission, SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

BD, Inc.
Station KFBD-Inc.
Box 58
Linn Creek, Missouri 65052

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed

[1] The coordinates for Channel 249C3 at Potosi are 37-52-51 and 90-47-01.

[2] The coordinates for Channel 250A at Waynesville are 37-49-42 and 92-10-27.

with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Kenneth W. Kuenzie
General Partner, Prime Time Radio
Station KWVB
102 Elm Street, Suite 203
Washington, Missouri 63090

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-230

In the Matter of

Amendment of Section 73.202(b), RM-7753
Table of Allotments,
FM Broadcast Stations.
(Graham, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 29, 1991; Released: August 9, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Brian J. Lord, d/b/a Skywave Broadcasting Company, proposing the allotment of Channel 285A to Graham, Washington, as its first local aural transmission service. Petitioner states it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 285A to Graham, Washington, since it would provide the community with its first local aural transmission service. Channel 285A can be allotted to Graham in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.3 kilometers (9.5 miles) south to avoid short-spacings to the construction permits for Station KSSY, Channel 285C2, Wenatchee, Washington, and Station KCMS, Channel 287C, Edmonds, Washington.[1] Since Graham is located within 320 kilometers of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Graham, Washington	--	285A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian J. Lord
Skywave Broadcasting Company
13313 SE 208th Street
Kent, Washington 98042
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 285A at Graham are North Latitude 46-54-56 and West Longitude 122-14-32.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-231

In the Matter of

Amendment of Section 73.202(b), RM-7233
Table of Allotments,
FM Broadcast Stations.
(Odessa, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 29, 1991; Released: August 9, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Oil Patch Broadcasting Partnership ("petitioner") requesting the allotment of Channel 267C2 Odessa, Texas,[1] as an additional channel for that market. Petitioner states that it will apply for channel, if allotted.

2. While petitioner requested the allotment of Channel 267C2 to Odessa, an engineering analysis indicates that the proposed allotment conflicts with a proposal filed by Albert L. Crain ("Crain") to substitute Channel 267C1 for Channel 265A at Crane, Texas. In an effort to resolve the technical conflicts between Crain's proposal and the request for the new allotment at Odessa, the staff has performed an engineering analysis to determine the availability of any alternate channels for use at Odessa. Our study shows that Channel 299C2 can be allotted to Odessa in lieu of Channel 267C2, thereby eliminating any conflict with the Crane, Texas, proceeding.

3. We believe the public interest would be served by proposing the allotment of Channel 299C2 to Odessa, Texas, since it could provide the community with an additional local FM service. Channel 299C2 can be allotted to Odessa in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.8 kilometers (17.9 miles) south to avoid a short-spacing to a construction permit (BPH-890712MK) for Station KYMI(FM), Channel 300C2, Los Ybane, Texas.[2] Since Odessa is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been requested.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Odessa, Texas	241C2, 245C1 250C, 256C	241C2, 245C1 250C, 256C 299C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Matt Edwards
Oil Patch Broadcasting Partnership
c/o National Cellular
301 Route 17N 4th Floor
Rutherford, New Jersey 07070
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and

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[1] Petitioner requested that the proposed channel be allotted to Odessa or the Odessa-Midland, Texas, radio market. Since petitioner has not provided us with any information to justify the allotment to Odessa-Midland on a hyphenated basis, and because the Commission generally does not make hyphenated allotments, we propose Odessa as the community for the proposed allotment.

[2] The coordinates for Channel 299C2 at Odessa are North Latitude 31-36-44 and West Longitude 102-28-21. Petitioner suggested that the allotment to Odessa could be co-located at the transmitter site of Station KQIP(FM), Odessa, at coordinates North Latitude 32-05-13 and West Longitude 102-17-12. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 299C2 at Odessa, Texas.

such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-497

In the Matter of

Amendment of Section 73.202(b), RM-7420
Table of Allotments,
FM Broadcast Stations.
(Garapan, Saipan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 29, 1991; Released: August 9, 1991

By the Chief, Allocations Branch:

1. Pursuant to the request of Commonwealth Radio Corp. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6343 (1990), proposing the allotment of Channel 262C2 to Garapan, Saipan, as that community's fourth local FM service. Petitioner and Far East Broadcasting Company, Inc., filed comments, each stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 262C2 to Garapan, Saipan, as that community's fourth local FM service. Channel 262C2 can be allotted to Garapan, Saipan, in compliance with the Commission's minimum distance separation requirements.[1]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Garapan, Saipan	230A, 250C2, 262C2, 280C2

4. The window period for filing applications for Channel 262C2 will open on **September 24, 1991,** and close on **October 24, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* inadvertently stated the coordinates as North Latitude 15-11-10 and West Longitude 145-44-26. The coordinates for Garapan, Saipan, should be North Latitude 15-11-10 and East Longitude 145-44-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-449

In the Matter of

Amendment of Section 73.202(b),	RM-7430
Table of Allotments,	RM-7595
FM Broadcast Stations.	
(Morro Bay and Paso Robles,[1]	
California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 29, 1991; Released: August 9, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 6000 (1990), issued at the request of Don Stewart ("petitioner") proposing the allotment of FM Channel 231A to Morro Bay, California, as that community's second local FM service. Petitioner filed supporting comments reiterating his intention to apply for Channel 231A, if allotted to Morro Bay. David Phillips ("Phillips") and Brenda S. Bellard ("Bellard") each filed supporting comments. Paso Robles Broadcasters ("PRB") filed comments and a counterproposal,[2] seeking to allot Channel 232A to Paso Robles, California, as that community's second local FM service. Edward Krovitz and Nancy Emiko Yanagibashi ("Krovitz and Yanagibashi") filed joint comments in response to the counterproposal, advocating support of the Morro Bay proposal. Petitioner also filed responsive comments.[3]

2. The proposals are mutually exclusive since the two communities are separated by less than the required minimum distance of 72 kilometers between first adjacent Class A channels. However, we believe that both communities are deserving of a second local FM service. Therefore, in an effort to accommodate each request, the Commission conducted an engineering analysis to determine the availability of an alternate channel to resolve the conflict between the mutually-exclusive proposals. As a result, we have determined that Channel 276A is available for consideration at Paso Robles,[4] which permits the consideration of Channel 231A at Morro Bay without the need for a comparative analysis of the two proposals.

3. In view of the above, we believe the public interest would be served by allotting Channel 231A to Morro Bay and Channel 276A to Paso Robles, California,[5] as a second local FM service at each community.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Morro Bay, California	231A, 259A
Paso Robles, California	223B, 276A

5. The window period for filing applications for Channel 231A at Morro Bay and for Channel 276A at Paso Robles, California, will open on **September 24, 1991,** and close on **October 24, 1991**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The community of Paso Robles, California, has been added to the caption.

[2] Public Notice of the counterproposal was given January 14, 1991, Report No. 1833.

[3] Petitioner's responsive comments were filed after the close of the comment period specified therefor in this proceeding, and were not accompanied by a request for their acceptance. Therefore, petitioner's reply comments will not be considered. *See* §1.415 of the Commission's Rules. PRB's motion to dismiss petitioner's responsive comments is, therefore, moot.

[4] Channel 232A at Paso Robles would require a site restriction 12.3 kilometers (7.6 miles) east of the community, whereas Channel 276A could be allotted in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commissions Rules, without a site restriction. Since the Commission endeavors to impose the least restrictive theoretical site from the intended city of license, we believe that the public interest would be better served by considering Channel 276A at Paso Robles in lieu of Channel 232A.

[5] Coordinates used for unrestricted Channel 231A at Morro Bay are 35-21-48 and 120-50-42. Coordinates used for Channel 276A at Paso Robles are 35-37-54 and 120-41-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-232

In the Matter of

Amendment of Section 73.202(b), RM-7755
Table of Allotments,
FM Broadcast Stations.
(Wilburton and Antlers, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 29, 1991; Released: August 9, 1991

Comment Date: September 30, 1991
Reply Comment Date: October 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Blue Mountain Broadcasting ("petitioner") requesting the substitution of Channel 279C1 for Channel 279A at Wilburton, Oklahoma, and the modification of its construction permit for Station KZUD to specify operation on the higher powered channel. To accommodate the allotment of Channel 279C1 at Wilburton, petitioner also requests the substitution of Channel 284A for unoccupied and unapplied for Channel 281A at Antlers, Oklahoma. Petitioner states that it will apply for Channel 279C1, if allotted to Wilburton.

2. We believe the public interest would be served by proposing the substitution of Channel 279C1 for Channel 279A at Wilburton, Oklahoma, because it could provide the community with its first wide coverage area FM service. Channel 279C1 can be allotted to Wilburton in compliance with the Commission's minimum distance separation requirements with a site restriction of 36.2 kilometers (22.5 miles) west to avoid short-spacings to Channel 276C2 at Atoka, Oklahoma, which is reserved for use by Station KHKC-FM, Station KKYK, Channel 279C, Little Rock, Arkansas, and Station KKIX, Channel 280C1, Fayetteville, Arkansas. Channel 284A can be allotted to Antlers without the imposition of a site restriction.[1] As requested, we also propose to modify Station KZUD's construction permit to specify operation on Channel 279C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Wilburton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Antlers, Oklahoma	281A	284A
Wilburton, Oklahoma	279A	279C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 30, 1991,** and reply comments on or before **October 15, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd, Simpson & Miller
1233 20th Street, N.W., Suite 205
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

[1] The coordinates for Channel 279C1 at Wilburton are North Latitude 34-59-06 and West Longitude 95-41-53. The coordinates for Channel 284A at Antlers are 34-13-54 and 95-36-06.

Use of the coordinates requested by petitioner, 34-47-35 and 95-27-24, would result in a short-spacing to the allotment coordinates reserved for Station KHKC-FM for Channel 276C2 at Atoka. However, use of these coordinates will not cause any short-spacing if Station KHKC-FM's pending application (ARN-880629MF) is granted.

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A Petition for Investigation
of Alleged Violations of the
Commission's Rules by a Commission
Employee

ORDER

Adopted: August 1, 1991; Released: August 9, 1991

By the Commission:

1. On May 31, 1991, Garden State Broadcasting Limited Partnership (Garden State) filed a Petition for Investigation[1] into possible violation of section 19.735-201a(d) of the Commission's rules, 47 C.F.R. § 19.735-201a(d),[2] as well as violation of section 1.1208(a) of the Commission's *ex parte* rules, 47 C.F.R. § 1.1208(a), [3] by a Commission employee. The Petition seeks relief pursuant to section 19.735-107(b) of the Commission's rules, 47 C.F.R. § 19.735-107(b).[4] Specifically, Garden State requests that an investigation be conducted to determine whether there has been any impact on the decision-making process in the Garden State proceeding and requests that the employee in question be precluded from any involvement in the proceeding pending the investigation.

2. The basis for its Petition are remarks attributed to a Special Assistant to the General Counsel in the May 20, 1991 issue of *Insight* magazine.[5] According to Garden State, because the alleged remarks were made in the context of a specific discussion of an adjudicatory proceeding, they "create at least the appearance" that the employee lacks the independence and impartiality required of a decision-making employee in the context of an adjudicatory proceeding.[6] The restricted matter at issue is the comparative renewal proceeding for station WWOR-TV, Secaucus, New Jersey, Mass Media Docket No. 88-382, wherein the Commission rejected a proposed settlement agreement between Garden State and WWOR-TV, Inc., *see Memorandum Opinion and Order*, 6 FCC Rcd 1524 (1991).

3. We do not believe that the remarks published in the *Insight* article, assuming their total accuracy, warrant the initiation of a Part 19 investigation. As a general matter, the test for disqualification on grounds of prejudice in an adjudicatory proceeding is whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[7]

4. As reported in the article, the employee expressly stated that it would be inappropriate for her to comment on the WWOR-TV proceeding. The article also describes the employee's general views on the impact of new FCC rules governing settlements and the employee's general view that permitting the sale of licenses would eliminate settlement hunters, whom the employee characterizes as extortionists. However, a disinterested reader of this article could not reasonably conclude that the employee's remarks were intended as a comment on, or a characterization of, the WWOR-TV proceeding or that the employee had decided the WWOR-TV proceeding in advance.[8] Indeed, the article is explicit that the employee's general comments were not addressed to the particular merits of the WWOR-TV case. Under the circumstances, the article does not, in our view, give rise to an inference of bias nor create any appearance of impropriety warranting an investigation.[9] In this regard, it is also noteworthy that even judges are free to decide cases involving policy questions on which they previously have expressed a view. *See Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1171 n. 51 (D.C. Cir. 1979). *See also, C & W Fish Co., Inc. v. Fox*, No. 90-5309, slip op. at 11 (D.C. Cir., May 7, 1991).

5. Petitioners further contend that the employee's alleged remarks raise questions as to possible violation of section 1.1208(a) of the Commission's rules, 47 C.F.R. § 1.1208(a), which prohibit *ex parte* presentations to or from decision-making personnel in a restricted proceeding. As defined in the Commission's rules, the term "decision-making personnel" includes any employee "who is or may reasonably be expected to be involved in the decisional process in the proceeding." *See* 47 C.F.R. § 1.1202(c); *see also Report and Order, In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3014 (1987).

6. While the employee in question may properly be characterized as a decision-making person within the meaning of the rule's definition, and adjudicatory proceedings are clearly restricted proceedings, the Commission's *ex parte* rules do not prohibit "general background discussions about an entire industry which do not directly relate to a specific agency adjudication involving a member of that industry or to formal rule making involving the industry as a whole." *See* 2 FCC Rcd at 3013-3014.

7. The *Insight* article reported the employee's position that it would be inappropriate for her to comment on Garden State's adjudicatory proceeding or its legal counsel. The article contains no quotations or statements attributed to the employee which comment on that proceeding. The mere fact that the magazine chose to follow the employee's statement declining to comment on the WWOR-TV proceeding with the employee's general views concerning the new FCC rules on settlement agreements does not support Garden State's claim that the employee violated the *ex parte* rules. The employee's comments pertaining to general industry problems do not address the merits or outcome of the WWOR-TV adjudicatory proceeding and are therefore permissible. Thus, Garden State's allegations of *ex parte* violations are without merit.

8. After careful review of Garden State's Petition, we find that initiation of a Part 19 investigation under section 19.735-107(b) of the Commission's rules is not warranted.

9. Accordingly, IT IS ORDERED That, pursuant to sections 4(i), 4(j), and 303(r) of the Communications Act, 47 U.S.C. §§ 154 (i), 154(j) and 303(r), the Petition for Investigation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On June 7, 1991, an Opposition to the Petition was filed by the Mass Media Bureau (MMB), and on June 13, 1991, Garden State filed a Reply to MMB's Oppposition.

[2] Section 19.735-201a(d) of the Commission's rules requires FCC employees to avoid any action which might result in or create the appearance of "[l]osing complete independence or impartiality."

[3] Section 1.1208(a) of the Commission's rules prohibits "*ex parte* presentations to or from decision-making personnel in a restricted proceeding."

[4] Section 19.735-107(b) of the Commission's rules relates to the initiation of Part 19 investigations by the Chairman when it appears that an employee may have engaged in improper conduct.

[5] *See Attachment A* to Garden State's Petition.

[6] *Petition* at 1.

[7] *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970), quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959).

[8] *Id.* at 591.

[9] Nor do we believe it is in any way inappropriate for an employee whose duties relate to preventing abuse of the Commission's processes to have a role in adjudicatory matters, or that participation by such an employee in this case "threatens the appearance of impartiality," as Garden State alleges.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RDH COMMUNICATIONS, LIMITED PARTNERSHIP — File No. BPH-881215NG

For Construction Permit
for a New FM Station
on Channel 297A
in Baker, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; Released: August 9, 1991

By the Commission:

1. The Commission has under consideration a "Petition for Reconsideration" filed on February 19, 1991 by RDH Communications, Limited Partnership ("RDH"). RDH requests reconsideration of the dismissal of its captioned application by the Hearing Designation Order in MM Docket No. 90-634, *Oasis Radio Affiliates, Inc.*, 6 FCC Rcd 508 (MM Bur. 1991)("*HDO*"). We deny the petition for the reasons set forth below.

BACKGROUND

2. On December 15, 1988, the RDH application and nine other applications for the Baker, Louisiana facility were filed.[1] In reviewing the applications, the staff found that the financial qualifications certification page (Section III of Form 301) was omitted from RDH's application. Thereafter, the staff dismissed the RDH application in the *HDO* as inadvertently accepted for tender.[2]

3. In its petition for reconsideration, RDH claims that its application was carefully prepared and that its principal Renette D. Hall did in fact certify to its financial qualifications. However, RDH concedes that the original application on file at the Commission, and all of the Commission's copies of the application, lack the requisite financial certification page. To explain this deficiency, RDH surmises that:

> Either: (1) the page was lost in transit from Ms. Hall's home to RDH's FCC counsel, (2) the page was lost in copying at counsel's office prior to filing, or (3) the page was lost in the Commission's files.

RDH Petition at 6. In addition, RDH asserts that in other proceedings the Commission has not dismissed applicants with financial deficiencies, but has instead allowed them to participate in comparative hearings.

DISCUSSION

4. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 , published May 13, 1985 ("*Report and Order*"), the Commission, seeking to deter the filing of carelessly prepared, unprocessable applications, adopted a "hard look" approach to processing commercial FM broadcast applications. Under this approach, applications which are not substantially complete at tender are to be returned to the applicant, thereby losing their filing status. *Id.*, para. 23. The criteria for determining such "substantial completeness" are set forth in the *Report and Order* at Appendix D. Therein, we identified the financial certification as an element which is critically important to the processability of the application. We explained:

> [2.b.] *Financial ability to construct.* The Commission authorizes new or changed facilities with the expectation that such will be built quickly and that service will be expeditiously provided via those facilities to the public. It is pointless to grant an authorization of facilities that cannot be built. *It is likewise pointless to process an application where a response to certification of financial ability to construct is not provided.*
>
> * * *
>
> If any of the above information is missing, the application will be returned as not sufficient for tender....
>
> * * *
>
> *If any of the defects listed above are overlooked during the initial review and are later found in the process, the application will be returned as inadvertently accepted for tender.... Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it.*

Id., Appendix D (emphases added).

5. The RDH application was undisputably filed after the June 12, 1985 effective date of the *Report and Order* and was therefore fully subject to its requirements. Because the application as filed did not contain a financial certification page, it was manifestly not acceptable for tender. While RDH speculates on the cause of this omission, it has not proffered any evidence that the Commission was in any manner responsible for it. Regardless of, whether the omission occurred in the office of applicant's counsel, or in transit, the applicant bears the full burden of its (or

[1] Two of the applications were dismissed pre-designation at the respective applicants' requests. The remaining seven applications were designated for comparative hearing.
[2] The other applications contained the required financial certifications.

its agents') failure to file a complete application. Accordingly, the application was properly dismissed as inadvertently accepted for tender. *See Northland Broadcasters, A Limited Partnership*, 4 FCC Rcd 6508-09 (MM Bur. 1989).

6. Finally, we have reviewed the case precedent that RDH cites in support of its claim that it should have been allowed to participate in the comparative hearing. All are readily distinguishable. First, RDH cites the hearing designation order in *Vela Broadcasting Company*, MM Docket No. 85-132, wherein an applicant who had not certified "Yes" or "No" but had instead merely indicated it "will provide financial certification" was permitted to submit an amended financial certification at hearing. However, that Order was released on May 20, 1985, *prior to the effective date* of the *Report and Order*, and therefore is without precedential value here. Similarly, its citation to *City Light Communications, Inc.*, 4 FCC Rcd 1676 (MM Bur. 1989), a television case to which the FM "hard look" policy does not apply, is to no avail.

7. RDH also cites a number of cases in which applications were not dismissed but were instead set for hearing with financial issues, *Phenn H. Phelps*, 6 FCC Rcd 579, 580 (MM Bur. 1991); *The Mirkwood Group*, 6 FCC Rcd 511 (MM Bur. 1991); *Gerald Penovich*, 5 FCC Rcd 7395 (MM Bur. 1990); *Radio Associates, Inc.*, 5 FCC Rcd 7399 (MM Bur. 1990); *Kathy L. McElroy*, 5 FCC Rcd 3778 (MM Bur. 1990); *English Communications Limited Partnership*, 5 FCC Rcd 3755 (MM Bur. 1990); *Macon Radio Associates Limited Partnership*, 5 FCC Rcd 3504 (MM Bur. 1990); *Carol Sue Spraker*, 5 FCC Rcd 2973 (MM Bur. 1990); *Michael Scott Copeland*, 5 FCC Rcd 2938 (MM Bur. 1990).[3] The Commission's review of all the relevant applications in these cases indicates that, as originally filed, each such application contained a "No" financial certification. Thus, these applications were properly set for hearing, and not returned under the "hard look" policy, because at that time a "No" certification was viewed as a matter of grantability of the application, and not as a tenderability defect, *Kelly Broadcasting System Corp.*, 5 FCC Rcd 489 (MM Bur. 1990). In contrast, a failure to check either "Yes" or "No" (or a failure to submit the financial certification page with the application) has been viewed from the outset of the "hard look" policy as a tenderability defect which rendered the application substantially incomplete and therefore required its return to the applicant. *See Revision of Form 301*, 4 FCC Rcd 3853, 3868 n. 71 (1989); *Northland Broadcasters, supra*.[4] Tenderability defects pertain directly to the processability of the application, and the "hard look" policy was designed both to increase staff efficiency in processing a high volume of applications and to create an incentive for applicants to exercise care in completing applications. Lack of care in completing and submitting applications burdens our resources to an intolerable extent, and therefore justifies our summary dismissal of such applications. In sum, we affirm the *HDO*'s dismissal of the RDH application because it was untenderable when filed. *See Fred R. Morton, Jr.*, 5 FCC Rcd 606 (1990) (failure to include site availability certification requires dismissal of application as unacceptable for tender); *Ann D. Genthner*, 1 FCC Rcd 399 (1986) (same); *The Taber Broadcasting Co. of New Mexico*, 4 FCC Rcd 7892 (1989) (failure to sign application and to include certification of local public notice are both tenderability defects requiring dismissal of application).[5]

8. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on February 19, 1991 by RDH Communications, Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] Also, RDH's citation to *Laverne J. Falk*, 5 FCC Rcd 7705 (MM Bur. 1990) (financial issue specified), is inapposite because the applicant therein had responded to the financial certification question with a qualified "Yes".

[4] Subsequently, in *Revision of Form 301*, we strengthened our financial certification requirement and specified that "if an applicant fails to certify in the application that it is financially qualified (*i.e.*, if it does not respond to the question or checks "No"), its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564." *Id.* at 3859; *see also id.* at 3868 n. 71. However, in evaluating the RDH application, we have not applied this more stringent interpretation of the "hard look" policy, because the application was filed before that policy change was announced.

[5] Recently, the U.S. Court of Appeals affirmed the Commission's invocation of the "hard look" policy. *Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991) (applicants summarily dismissed because their technical proposals were not acceptable in that they did not comply with a bilateral agreement between the U.S. and Mexico).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Subpart S of
Part 90 of the Rules to
Permit Licensing of Channels
in the 821-824/866-869 MHz Bands in
the U.S./Mexico Border Area

ORDER

Adopted: July 31, 1991; Released: August 9, 1991

By the Chief, Private Radio Bureau:

1. On July 24, 1986, the Commission allocated six megahertz of spectrum in the 821-824 MHz and 866-869 MHz bands for use exclusively in the Public Safety and Special Emergency Radio Services.[1] The Commission delineated service rules for these six megahertz of spectrum in a subsequent *Report and Order*.[2] That *Report and Order*, however, did not provide for use of the 821-824/866-869 MHz bands within 110 km (68.4 miles) of the Mexican border, pending agreement with Mexico.

2. On July 2, 1991, the Federal Communications Commission of the United States of America and the Direccion General De Politicas Y Normas De Comunicaciones of the United Mexican States signed a Memorandum of Understanding (MOU) that governs use of the 821-824/866-869 MHz bands within 110 km (68.4 miles) of the U.S./Mexican border. The MOU specifies the channels that will be available for licensing by each administration within the border area. This *Order* modifies Subpart S of Part 90, 47 C.F.R. Part 90, to conform the Rules to the MOU and to permit licensing of radio systems in the Mexican border area.

3. The 821-824/866-869 MHz Public Safety channels are available for licensing in the Mexican border zone on publication of this *Order* in the Federal Register. Such licensing must conform with Regional Public Safety Plans that have been accepted by the Commission.

4. These rule changes will facilitate the construction of additional Private Land Mobile Radio stations in the Mexican border area. This should result in improved mobile communication service to the public safety community without adversely affecting any party. As this *Order* does not impose new rules on licensees that would adversely affect their substantive rights, we find that notice and comment procedures are neither necessary nor appropriate.[3] To initiate a notice and comment procedure to make these additional channels available for licensing in the Mexican border area would significantly delay the use of these channels without any countervailing public interest benefit. Further, because the rule changes relieve a restriction, we also conclude that these changes should become effective immediately upon publication in the Federal Register.[4]

5. Therefore, effective upon publication in the Federal Register, Part 90 of the Commission's Rules is amended as indicated in the Appendix below. This is based on authority contained in Sections 4(i) and 303 of the Communications Act, as amended, 47 U.S.C. §§ 154(i) and 303, Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1), and 5 U.S.C. §§ 553(b)(3)(B) and (d)(1).

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.601 is revised to read as follows:

Subpart S - Regulations Governing Licensing and Use of Frequencies in the 806-824, 851-869, 896-901, and 935-940 MHz Bands

§ 90.601 Scope.

This subpart sets out the regulations governing the licensing and operations of all systems operating in the 806-824/851-869 MHz and 896-901/935-940 MHz bands. It includes eligibility requirements, application procedures, operational, and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflict, the provisions of this subpart shall govern with respect to licensing and operation in these frequency bands.

3. Section 90.619 is amended by revising paragraphs (a), and (a)(1), redesignating paragraphs (a)(2), (a)(3) and (a)(4) as paragraphs (a)(3), (a)(4) and (a)(5), respectively,

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[1] Report and Order, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 61 RR2d 165 (1986).

[2] In the Matter of Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services, Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1988).

[3] *See* 5 U.S.C. § 553(b)(3)(B).

[4] *See* 5 U.S.C. § 553(d)(1).

adding new paragraph (a)(2), revising the title and caption for Table 1, and adding new Tables 1B, and 1C, to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

(a) U.S./Mexico border area. The channels listed in Tables 1A, 2, 3, and 4 are offset 12.5 kHz lower in frequency than those specified in § 90.613. The Channel 201 mobile frequency will be 811.000 MHz, followed by Channel 202 at 811.025 MHz and proceeding with uniform 25 kHz channeling to Channel 400 at 815.975 MHz. Base station frequencies will be 45 MHz higher in frequency. These channels are available for assignment for conventional or trunked systems only in areas 110 kilometers (68.4 miles) or less from the U.S./Mexico border. Stations located on Mt. Lemmon, serving the Tucson, AZ area, shall only be authorized offset frequencies.

(1) Table 1A lists the channels in the 806-821/851-866 MHz band that are available for assignment to eligible applicants in the Public Safety Category (consisting of the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, and Special Emergency Radio Services). Specialized Mobile Radio Systems (SMRS) will not be authorized in this category. These channels are available for intercategory sharing as indicated in § 90.621(g).

Table 1A - United States/Mexico Border Area, Public Safety Category 806-821/851-866 MHz Band (85 Channels):

* * * * *

(2) Certain channels in the 821-824/866-869 MHz band are also available to eligible applicants in the Public Safety Category in areas within 110 kilometers (68.4 miles) of the U.S./Mexican border. These channels will be assigned according to the policies defined in the Report and Order of Gen. Docket No. 87-112 (See §§ 90.16 and 90.34). The following channels are available only for mutual aid purposes as defined in Gen. Docket No. 87-112: channels 601, 639, 677, 715, and 753. The specific channels that are available for licensing in this band within 110 kilometers (68.4 miles) of the Mexican border are listed in Table 1B, and are subject to Effective Radiated Power (ERP) and Antenna Height limitations as indicated in Table 1C. In addition, all channels designated for use within Mexico in this band are available for assignment within 110 kilometers (68.4 miles) of the Mexican border if the maximum power flux density (PFD) of the station's transmitted signal at any point at or beyond the border does not exceed -107 dBW/m^2. The spreading loss shall be calculated using the free space formula taking into account any antenna discrimination in the direction of the border. Authorizations for stations using channels allotted primarily to Mexico will be secondary to Mexican operations and conditioned to require that licensees take immediate action to eliminate any harmful interference resulting from the station's transmitted signal exceeding -107 dBW/m^2.

Table 1B - United States/Mexico Border Area, Public Safety Category 821-824/866-869 MHz Band (107 Channels):

Channel	Base Frequency	Mobile Frequency	Country
601	866.0125	821.0125	Both Countries
***	866.0250	821.0250	Not Available
602	866.0375	821.0375	U.S.
603	866.0500	821.0500	U.S.
604	866.0625	821.0625	U.S.
605	866.0750	821.0750	U.S.
606	866.0875	821.0875	U.S
607	866.1000	821.1000	U.S
608	866.1125	821.1125	U.S
609	866.1250	821.1250	U.S.
610	866.1375	821.1375	U.S.
611	866.1500	821.1500	Guard Channel
612	866.1625	821.1625	MEXICO
613	866.1750	821.1750	MEXICO
614	866.1875	821.1875	MEXICO
615	866.2000	821.2000	MEXICO
616	866.2125	821.2125	MEXICO
617	866.2250	821.2250	MEXICO
618	866.2375	821.2375	MEXICO
619	866.2500	821.2500	MEXICO
620	866.2625	821.2625	MEXICO
621	866.2750	821.2750	MEXICO
622	866.2875	821.2875	MEXICO
623	866.3000	821.3000	MEXICO
624	866.3125	821.3125	MEXICO
625	866.3250	821.3250	MEXICO
626	866.3375	821.3375	MEXICO
627	866.3500	821.3500	MEXICO
628	866.3625	821.3625	MEXICO
629	866.3750	821.3750	Guard Channel
630	866.3875	821.3875	U.S.
631	866.4000	821.4000	U.S.
632	866.4125	821.4125	U.S.
633	866.4250	821.4250	U.S.
634	866.4375	821.4375	U.S.
635	866.4500	821.4500	U.S.
636	866.4625	821.4625	U.S.
637	866.4750	821.4750	U.S.
638	866.4875	821.4875	U.S.
***	866.5000	821.5000	Not Available
639	866.5125	821.5125	Both Countries
***	866.5250	821.5250	Not Available
640	866.5375	821.5375	U.S.
641	866.5500	821.5500	U.S.
642	866.5625	821.5625	U.S.
643	866.5750	821.5750	U.S.

Channel	Base Frequency	Mobile Frequency	Country
644	866.5875	821.5875	U.S.
645	866.6000	821.6000	U.S.
646	866.6125	821.6125	U.S.
647	866.6250	821.6250	U.S.
648	866.6375	821.6375	U.S.
649	866.6500	821.6500	Guard Channel
650	866.6625	821.6625	MEXICO
651	866.6750	821.6750	MEXICO
652	866.6875	821.6875	MEXICO
653	866.7000	821.7000	MEXICO
654	866.7125	821.7125	MEXICO
655	866.7250	821.7250	MEXICO
656	866.7375	821.7375	MEXICO
657	866.7500	821.7500	MEXICO
658	866.7625	821.7625	MEXICO
659	866.7750	821.7750	MEXICO
660	866.7875	821.7875	MEXICO
661	866.8000	821.8000	MEXICO
662	866.8125	821.8125	MEXICO
663	866.8250	821.8250	MEXICO
664	866.8375	821.8375	MEXICO
665	866.8500	821.8500	MEXICO
666	866.8625	821.8625	MEXICO
667	866.8750	821.8750	Guard Channel
668	866.8875	821.8875	U.S.
669	866.9000	821.9000	U.S.
670	866.9125	821.9125	U.S.
671	866.9250	821.9250	U.S.
672	866.9375	821.9375	U.S.
673	866.9500	821.9500	U.S.
674	866.9625	821.9625	U.S.
675	866.9750	821.9750	U.S.
676	866.9875	821.9875	U.S.
***	867.0000	822.0000	Not Available
677	867.0125	822.0125	Both Countries
***	867.0250	822.0250	Not Available
678	867.0375	822.0375	U.S.
679	867.0500	822.0500	U.S.
680	867.0625	822.0625	U.S.
681	867.0750	822.0750	U.S.
682	867.0875	822.0875	U.S.
683	867.1000	822.1000	U.S.
684	867.1125	822.1125	U.S.
685	867.1250	822.1250	U.S.
686	867.1375	822.1375	U.S.
687	867.1500	822.1500	Guard Channel
688	867.1625	822.1625	MEXICO
689	867.1750	822.1750	MEXICO
690	867.1875	822.1875	MEXICO
691	867.2000	822.2000	MEXICO
692	867.2125	822.2125	MEXICO

Channel	Base Frequency	Mobile Frequency	Country
693	867.2250	822.2250	MEXICO
694	867.2375	822.2375	MEXICO
695	867.2500	822.2500	MEXICO
696	867.2625	822.2625	MEXICO
697	867.2750	822.2750	MEXICO
698	867.2875	822.2875	MEXICO
699	867.3000	822.3000	MEXICO
700	867.3125	822.3125	MEXICO
701	867.3250	822.3250	MEXICO
702	867.3375	822.3375	MEXICO
703	867.3500	822.3500	MEXICO
704	867.3625	822.3625	MEXICO
705	867.3750	822.3750	Guard Channel
706	867.3875	822.3875	U.S.
707	867.4000	822.4000	U.S.
708	867.4125	822.4125	U.S.
709	867.4250	822.4250	U.S.
710	867.4375	822.4375	U.S.
711	867.4500	822.4500	U.S.
712	867.4625	822.4625	U.S.
713	867.4750	822.4750	U.S.
714	867.4875	822.4875	U.S.
***	867.5000	822.5000	Not Available
715	867.5125	822.5125	Both Countries
***	867.5250	822.5250	Not Available
716	867.5375	822.5375	U.S.
717	867.5500	822.5500	U.S.
718	867.5625	822.5625	U.S.
719	867.5750	822.5750	U.S.
720	867.5875	822.5875	U.S.
721	867.6000	822.6000	U.S.
722	867.6125	822.6125	U.S.
723	867.6250	822.6250	U.S.
724	867.6375	822.6375	U.S.
725	867.6500	822.6500	Guard Channel
726	867.6625	822.6625	MEXICO
727	867.6750	822.6750	MEXICO
728	867.6875	822.6875	MEXICO
729	867.7000	822.7000	MEXICO
730	867.7125	822.7125	MEXICO
731	867.7250	822.7250	MEXICO
732	867.7375	822.7375	MEXICO
733	867.7500	822.7500	MEXICO
734	867.7625	822.7625	MEXICO
735	867.7750	822.7750	MEXICO
736	867.7875	822.7875	MEXICO
737	867.8000	822.8000	MEXICO
738	867.8125	822.8125	MEXICO
739	867.8250	822.8250	MEXICO
740	867.8375	822.8375	MEXICO
741	867.8500	822.8500	MEXICO

Channel	Base Frequency	Mobile Frequency	Country
742	867.8625	822.8625	Guard Channel
743	867.8750	822.8750	U.S.
744	867.8875	822.8875	U.S.
745	867.9000	822.9000	U.S.
746	867.9125	822.9125	U.S.
747	867.9250	822.9250	U.S.
748	867.9375	822.9375	U.S.
749	867.9500	822.9500	U.S.
750	867.9625	822.9625	U.S.
751	867.9750	822.9750	U.S.
752	867.9875	822.9875	U.S.
***	868.0000	823.0000	Not Available
753	868.0125	823.0125	Both Countries
***	868.0250	823.0250	Not Available
754	868.0375	823.0375	U.S.
755	868.0500	823.0500	U.S.
756	868.0625	823.0625	U.S.
757	868.0750	823.0750	U.S.
758	868.0875	823.0875	U.S.
759	868.1000	823.1000	U.S.
760	868.1125	823.1125	U.S.
761	868.1250	823.1250	U.S.
762	868.1375	823.1375	U.S.
763	868.1500	823.1500	Guard Channel
764	868.1625	823.1625	MEXICO
765	868.1750	823.1750	MEXICO
766	868.1875	823.1875	MEXICO
767	868.2000	823.2000	MEXICO
768	868.2125	823.2125	MEXICO
769	868.2250	823.2250	MEXICO
770	868.2375	823.2375	MEXICO
771	868.2500	823.2500	MEXICO
772	868.2625	823.2625	MEXICO
773	868.2750	823.2750	MEXICO
774	868.2875	823.2875	MEXICO
775	868.3000	823.3000	MEXICO
776	868.3125	823.3125	MEXICO
777	868.3250	823.3250	MEXICO
778	868.3375	823.3375	MEXICO
779	868.3500	823.3500	MEXICO
780	868.3625	823.3625	Guard Channel
781	868.3750	823.3750	U.S.
782	868.3875	823.3875	U.S.
783	868.4000	823.4000	U.S.
784	868.4125	823.4125	U.S.
785	868.4250	823.4250	U.S.
786	868.4375	823.4375	U.S.
787	868.4500	823.4500	U.S.
788	868.4625	823.4625	U.S.
789	868.4750	823.4750	U.S.
790	868.4875	823.4875	U.S.

Channel	Base Frequency	Mobile Frequency	Country
791	868.5000	823.5000	U.S.
792	868.5125	823.5125	U.S.
793	868.5250	823.5250	U.S.
794	868.5375	823.5375	U.S.
795	868.5500	823.5500	U.S.
796	868.5625	823.5625	U.S.
797	868.5750	823.5750	U.S.
798	868.5875	823.5875	U.S.
799	868.6000	823.6000	U.S.
800	868.6125	823.6125	Guard Channel
801	868.6250	823.6250	MEXICO
802	868.6375	823.6375	MEXICO
803	868.6500	823.6500	MEXICO
804	868.6625	823.6625	MEXICO
805	868.6750	823.6750	MEXICO
806	868.6875	823.6875	MEXICO
807	868.7000	823.7000	MEXICO
808	868.7125	823.7125	MEXICO
809	868.7250	823.7250	MEXICO
810	868.7375	823.7375	MEXICO
811	868.7500	823.7500	MEXICO
812	868.7625	823.7625	MEXICO
813	868.7750	823.7750	MEXICO
814	868.7875	823.7875	MEXICO
815	868.8000	823.8000	MEXICO
816	868.8125	823.8125	MEXICO
817	868.8250	823.8250	MEXICO
818	868.8375	823.8375	MEXICO
819	868.8500	823.8500	MEXICO
820	868.8625	823.8625	MEXICO
821	868.8750	823.8750	MEXICO
822	868.8875	823.8875	MEXICO
823	868.9000	823.9000	MEXICO
824	868.9125	823.9125	Guard Channel
825	868.9250	823.9250	U.S.
826	868.9375	823.9375	U.S.
827	868.9500	823.9500	U.S.
828	868.9625	823.9625	U.S.
829	868.9750	823.9750	U.S.
830	868.9875	823.9875	U.S.

Table 1C - Limits of Effective Radiated Power (ERP) Corresponding to Antenna Heights of Base Stations in the 821-824/866-869 MHz Band within 110 kilometers (68.4 miles) of the Mexican Border

Antenna Height Above Mean Sea Level		ERP
Meters	Feet	Watts (maximum)
0 - 503	0 - 1650	500
504 - 609	1651 - 2000	350
610 - 762	2001 - 2500	200
763 - 914	2501 - 3000	140
915 - 1066	3001 - 3500	100
1067 - 1219	3501 - 4000	75
1220 - 1371	4001 - 4500	70
1372 - 1523	4501 - 5000	65
Above 1523	Above 5000	5

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UPS TELECOMMUNICATIONS, INC. File No. I-T-C-91-093

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of common carrier services between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 29, 1991; Released: August 7, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by UPS Telecommunications Inc. (UPS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) and interconnecting facilities for the provision of international digital services between the U.S. and various overseas points, via the UK. The application was placed on public notice on April 17, 1991. No comments were received.

2. UPS is a non-dominant international carrier currently providing international services between the U.S. and various international points. It now proposes to acquire and operate one-half interest in one T-1 circuit in the PTAT-1 cable. Since UPS does not currently offer direct services between the U.S. and the points requested, the capacity in PTAT-1 will not be used to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [1] that it would require common carriers wishing to acquire capacity in the PTAT-1 cable system to file applications pursuant to Section 214 of the Communications Act.[2] In this context, we find that UPS's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[3] Furthermore, we find that UPS's application does not raise any economic impact issues.[4]

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the acquisition of the requested facilities for the provision of direct services between the U.S. and the points listed in the Appendix by UPS.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-093 IS GRANTED, and UPS is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate one T-1 circuit in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cableheads in the UK, Ireland and Bermuda;

b. lease a one-half interest in and operate any necessary connecting facilities between the UK and the borders of the countries listed in the Appendix;

c. lease and operate any necessary domestic connecting facilities; and

d. use said facilities to provide international digital services between the U.S., on the one hand, and the points listed in the Appendix, on the other hand, via the UK.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between UPS and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Afghanistan
Andorra
Austria
Azores
Bangladesh
Belguim
Bulgaria
Bermuda
Brunei
China (PRC)
Cyprus
Czechoslovakia
Denmark
Finland
France
Germany
Gibraltar
Greece
Greenland
Hong Kong
Hungary
Iceland
India
Indonesia
Ireland
Italy
Japan
Korea, Republic of
Liechtenstein
Luxembourg
Macao
Malaysia
Malta
Myanmar
Nepal
Netherlands
Norway
Pakistan
Philippines, Republic of
Poland
Portugal
Roumania
Singapore
Spain
Sri Lanka
Sweden
Switzerland
Taiwan
Thailand
Turkey
USSR
United Kingdom
Yugoslavia

FOOTNOTES

[1] *Private Submarine Cable Decision*, 100 FCC 2d 1033 (1985).

[2] This requirement was restated in the *International Competitive Carrier* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[3] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[4] The Commission stated that it has authority under the public interest mandate of Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-166

In the Matter of

Local Exchange Carriers' Individual
Case Basis DS3 Service Offerings

Bell Atlantic Telephone Companies
Revisions to Tariff F.C.C. No. 1 Transmittal No. 395

BellSouth Telephone Companies
Revisions to Tariff F.C.C. No. 4 Transmittal No. 354

Southwestern Bell Telephone Company
Revisions to Tariff F.C.C. No. 68 Transmittal No. 2039

US West Communications
Revisions to Tariff F.C.C. No. 1 Transmittal No. 127

Applications for Review

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; Released: July 19, 1991

By the Commission: Commissioner Marshall dissenting and issuing a statement; Commissioner Duggan concurring in the result.

I. INTRODUCTION

1. On February 22, 1991, the Common Carrier Bureau (Bureau) issued an order initiating an investigation of the above-captioned tariff revisions and partially suspending some charges and other provisions.[1] The tariff revisions establish general rates for dark fiber.[2] The four carriers have filed applications for review of the Bureau's *Suspension Order*. Four parties filed oppositions to one or more of the applications. [3] For the reasons discussed below, we affirm the actions taken by the Bureau in the *Suspension Order*.[4]

II. BACKGROUND

2. In the *ICB Order*, this Commission found that most individual case basis (ICB) rates for DS3 and "DS3-equivalent" services[5] are unreasonably discriminatory and, therefore, unlawful under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[6] Consequently, we ordered several local exchange carriers (LECs) to convert their ICB rates for those services to nondiscriminatory, generally available rates.[7] That proceeding also investigated the use of ICB rates for dark fiber services, but the *ICB Order* concluded that the LECs did not have sufficient experience with dark fiber at that time to file averaged rates. We therefore allowed carriers to continue using ICB arrangements for that service until they developed such experience.[8]

3. Several parties sought reconsideration of the *ICB Order* on various grounds, including that certain LECs had sufficient experience to develop general rates for dark fiber services. In the *Reconsideration Order*,[9] we found that new information demonstrated that Bell Atlantic, BellSouth, SWB, and US West have had sufficient experience in the provision of dark fiber service to support the development of averaged rates.[10] Accordingly, we directed those carriers to terminate their dark fiber ICBs within one year and to file general rates for dark fiber service.

4. On November 1, 1990, Bell Atlantic, BellSouth, SWB and US West filed the above-captioned tariff revisions to establish general rates for dark fiber services.[11] The Bureau found substantial reason to believe that these rates are excessive,[12] and concluded that the tariffs raise substantial questions of lawfulness that warrant investigation. Under the authority of Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), the Bureau suspended a portion of the rates and other provisions and initiated an investigation of the carriers' dark fiber general rates and rate structures, as well as terms and conditions established in the tariffs.[13] The Bureau used estimates of the per mile cost of dark fiber for each carrier to determine which portion of the rates would be suspended.[14] The Bureau also suspended the automatic termination provisions contained in the BellSouth and US West tariffs; the bit rate restrictions in the SWB tariff; and the five year service term in the Bell Atlantic tariff.[15]

III. DISCUSSION

A. Commission Jurisdiction over Dark Fiber Services

5. SWB argues that, as an initial matter, this Commission must determine whether we have jurisdiction over dark fiber services.[16] SWB asserts that the Commission lacks authority to require carriers to provide what it calls "pure" dark fiber facilities since it has never ruled that dark fiber is a communications service subject to regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-224.[17] Further, SWB argues that because dark fiber is a facility with no transmission capabilities it does not come within the definition of "wire communication," under Section 3(a) of the Communications Act, 47 U.S.C. § 153(a), and thus does not constitute a communications service under Title II.[18] MFS and WTG argue that the Commission has exercised jurisdiction over dark fiber since the inception of the service, and that the carriers have acceded to this jurisdiction by filing their ICB arrangements in their interstate tariffs.[19] MFS also contends that the Commission has determined that when dark fiber is provided through the use of ratepayer-funded facilities it is subject to tariffing.[20]

6. SWB's jurisdictional argument is essentially a collateral attack upon this Commission's order requiring SWB to file generally available dark fiber rates. That order was based on the premise that the carriers had acceded to the Commission's jurisdiction over dark fiber offerings.[21] SWB did not petition for further reconsideration to challenge that jurisdictional determination. The Bureau properly declined to examine the validity of a prior Commission determination. The Bureau initiated this in-

vestigation to determine whether SWB and the other carriers have complied with the requirements of the prior Commission order.

B. Authority under Section 204 (a) To Set Interim Rates

7. All four carriers argue that the *Suspension Order* does not serve the public interest and goes beyond the authority of the Commission under Section 204(a). The carriers acknowledge that Section 204(a) authorizes a partial suspension of rates, but argue that the Bureau action is tantamount to a prescription of rates.[22] They contend that the *Suspension Order* in effect suspended their tariffs in whole and imposed entirely new rates and rate structures.[23] That type of action is only allowed under Section 205, according to the carriers, and the Bureau did not cite that provision as authority for its action or follow the procedural requirements of that section.[24] SWB states that the legislative history indicates that Section 204(a) was only meant to allow the Commission to suspend parts of rate changes for existing services.[25] US West argues that the *Suspension Order* will lead to instability for customers who will not know what rates or terms will apply to their dark fiber service, or whether it will even still be available, in the long term.[26]

8. MCI and WTG repond that the Bureau's action does not prescribe rates, but merely mandates a partial suspension, which is expressly authorized by the terms of Section 204(a).[27] MCI also argues that the *Modification Order* makes it clear that the Bureau did not establish a new rate structure for the carriers.[28] In addition, WTG notes that the courts have recognized the Commission's authority to set interim rates pending the outcome of a tariff investigation.[29]

9. We find that the authority granted to the Commission in Section 204(a), and specifically invoked by the Bureau in the *Suspension Order*,[30] permits partial suspension of rates pending an investigation. Further, given the history of this proceeding and this Commission's decision that the Communications Act requires dark fiber services to be generally tariffed, we find the Bureau's action to be in the public interest.

10. Section 204(a) states in relevant part:

> Whenever there is filed with the Commission any *new or revised* charge, classification, regulation or practice, the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing . . . may suspend the operation of such charge, classification, regulation or practice, *in whole or in part* but not for a period longer than five months beyond the time when it would otherwise go into effect . . . .

47 U.S.C. § 204(a) (emphasis added).

11. In the absence of judicial interpretation concerning the meaning of "in whole or in part" in this statute,[31] we have two sources to resolve issues of statutory interpretation: the language of the statute and its legislative history. In this case, the plain language of Section 204(a) permits suspension of a charge "in whole or in part" for five months beyond the period when it would otherwise go into effect. A fundamental principle of statutory interpretation holds that when the language of a statute is clear, an examination of legislative history is unwarranted.[32] We therefore find that the clear language of the statute supports a partial suspension and the establishment of interim rates during the five-month suspension period. Moreover, we believe that the legislative history of Section 204(a) and its 1976 amendments[33] is consistent with our interpretation of the statute. Contrary to SWB's argument, we find nothing in the legislative history to indicate that the Commission's partial suspension authority is limited to existing services. Even assuming that dark fiber is not an existing service, the statute explicitly states that it applies to "new or revised" charges, and the carriers have not provided us with citations to the history that contradict our interpretation.

12. We also disagree that the Bureau's action was in effect a prescription of rates, and consequently violated Section 205. The *Suspension Order* as modified did not establish lawful rates that must be charged by the carrier. Rather, it simply suspended all or part of the charges for some rate elements that the carriers had created, and had the effect of temporarily establishing interim rates based on the remaining portion of the recurring charges filed by the carriers. The Bureau determined the interim rates by calculating the revenue requirements for each carrier's dark fiber service and allowed only that portion of each carrier's proposed dark fiber rates to take effect which reflected those requirements. To ensure the interim rates accurately reflected the rate structures proposed by the carriers, the Bureau issued the *Modification Order* to clarify that carriers were free to continue any volume discount structures reflected in their tariffs.[34] This Bureau action did not exceed our Section 204(a) powers. In these circumstances, the decision to exercise the partial suspension power served the public interest since a total suspension would have deprived customers of service during the suspension period, and investigation without suspension could have subjected customers to excessive rates.[35] We also note that Section 4(i) of the Communications Act gives the Commission authority to establish interim rates (even beyond the five month suspension period), particularly where, as here, there are no pre-existing lawful rates.[36]

C. Obligation of Carriers To Provide Dark Fiber Service

13. All four carriers note that they have filed applications under Section 214 of the Communications Act, 47 U.S.C. § 214, to discontinue the provision of dark fiber service. BellSouth contends that the *Suspension Order* forces it to provide a service which it has no desire to provide, or any obligation to continue to provide under Section 201 of the Communications Act, 47 U.S.C. § 201.[37] BellSouth also argues that the *Reconsideration Order* only states that if the carriers continue to provide dark fiber service, they must do so at averaged rates.[38] SWB complains that the Bureau is requiring it to offer a service it has never offered before. According to SWB, the *Suspension Order* requires it to provide "unencumbered" or "pure" dark fiber facilities, while up to now it has only offered "bit rate encumbered" dark fiber arrangements.[39] US West questions the suspension of the termination clause in its tariff since that clause may become effective less than two weeks from the termination date.[40] In contrast, EDS and WTG assert that the carriers have a statutory obligation under Section 201 to provide service upon reasonable request.[41] MCI argues that the *Reconsideration Order* explicitly states that the carriers shall file tariffs for dark fiber, and thus BellSouth's automatic termination provision is in violation of that Order.[42]

14. Contrary to BellSouth's assertion, in the *Reconsideration Order* this Commission directed these four carriers to offer dark fiber under general tariff.[43] The Bureau did not impose any new requirement upon the carriers by suspending rates or other tariff provisions. The filing of Section 214 applications to discontinue these services does not suspend or affect these carriers' obligation to comply with our *Reconsideration Order*. The carriers must provide dark fiber offerings at general rates unless or until this Commission grants the Section 214 applications. The Commission intends to complete its review of the carriers' Section 214 applications within five months.

15. Given that requirement, we conclude that the Bureau acted properly in suspending the automatic termination provisions contained in the BellSouth and US West tariffs, and allowing those carriers to explain in their direct cases in the investigation how those provisions are consistent with the *Reconsideration Order*.[44] Likewise, we find that the Bureau was correct to suspend the bit rate restrictions contained in the SWB tariff.[45] There is sufficient reason to believe these restrictions may be inconsistent with the *Reconsideration Order* to warrant suspending the bit rate restrictions.

D. Need for Retroactive Rate Adjustments After Final Rates Are Set

16. BellSouth states that there should be a retroactive adjustment provision requiring it, or its dark fiber customers, to make up the difference between the interim rates and the rates that become effective at the end of the suspension period.[46] MCI maintains that there is no justification for requiring customers to provide retroactive compensation to BellSouth if the dark fiber rates at the end of the suspension period are higher than the interim rates.[47]

17. We do not find that there is any requirement under Section 204 to provide for retroactive rate adjustments to make up the difference between the interim rates and the rates that will go into effect at the end of the suspension. In authorizing the suspension of carriers' tariffs in whole or in part pending completion of an investigation of the rates, the Communications Act contemplates that carriers during the suspension period would not collect all the revenues they would have otherwise collected under their tariffs. *See FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962). The limitation of the suspension period to five months was Congress' chosen means of balancing these competing interests; retroactive adjustments from customers to carriers are not part of a Section 204(a) suspension process.

18. With regard to the argument that the Bureau should have exercised discretion under Section 4(i) to establish a retroactive adjustment mechanism, we find that it acted properly in not doing so here. In this instance, interim rates would be in effect for a maximum of only five months, a far shorter period than present in *Lincoln Tel., FTC Communications*, and *ENFIA*, which did not involve Section 204(a) proceedings. Given the relatively short duration of the interim rates, the Bureau was justified in concluding that retroactive adjustments were not required.

E. Compliance of Interim Rates with Price Cap Regulation

19. The *LEC Price Cap Order* [48] modified the cost support requirements for tariff filings of price cap LECs and established a presumption of lawfulness for certain tariff filings. SWB and US West claim that the Bureau erred by failing to apply the applicable criteria in deciding to inititate an investigation of these tariffs. They state that these tariffs are "new" service tariffs for purposes of price cap regulation.[49] The carriers claim that the rates should be presumed lawful under the "new" service criteria related to price cap calculations. WTG responds that dark fiber is not a new service and neither the SWB nor US West tariff was a price cap filing.[50] MCI argues that the price cap rules have no applicability to a Section 204(a) action.[51]

20. As an initial matter, our price cap rules exclude ICB offerings from price cap limits,[52] and identify and define new services as offerings which add to a customer's range of choice.[53] In the present case, generic dark fiber offerings replace ICB offerings that were excluded from price cap regulation and that were not generally available. We therefore conclude that the generic dark fiber service is a "new" service for purposes of calculating rates under price cap regulation, providing customers with an additional fiber service.

21. The carriers' first attempt at filing general rates for dark fiber occurred prior to the time our price cap rules became operative. Thus, their tariffs were supported by a traditional, rate of return cost of service showing under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. By the time the Bureau issued its *Suspension Order*, however, price cap rules were in effect that for the most part substantially modified the cost support required of carriers in their filings.[54] In addition, at the time the Bureau adopted the *Suspension Order*, we had not yet adopted a cost support requirement for new services designed to determine if prices are too high, a feature of our price cap rules we subsequently added.[55]

22. Although the LECs argue that their dark fiber rates would generate net revenue in the future, such a showing would not justify terminating this suspension. Our subsequent decision in the *LEC Price Cap Reconsideration* and the *Part 69/ONA Order* to require additional cost data for new service prices is evidence of our belief that a net revenue showing, by itself, did not sufficiently probe the reasonableness of LEC new service rates. The net revenue showing, although it is a cost-based test, is not probative of whether rates are too high. The Bureau found that these tariffs raised substantial questions as to the lawfulness of the dark fiber rates. We conclude the Bureau properly suspended and investigated these rates.

F. Other Issues

23. Bell Atlantic questions the Bureau's suspension of its five-year service commitment in its dark fiber tariff, claiming that Bell Atlantic requires the five-year commitment to recover the full costs of dark fiber installations.[56] Bell Atlantic also argues that the interim rates are not compatible with Bell Atlantic's Carrier Access Billing System (CABS).[57] MCI argues that the five year service commitment may violate the Commission's depreciation represcription for fiber facilities.[58] MCI also contends that Bell Atlantic has been able to use CABS for other services

that do not have Channel Termination elements, and thus should be able to use CABS to bill for dark fiber services.[59]

24. In the *Reconsideration Order*, this Commission required the carriers to make dark fiber service generally available to all customers.[60] On its face the requirement to commit to a minimum of five years of service would appear to limit the ability of some potential customers to take advantage of this service. Given that, we believe it was appropriate for the Bureau to suspend that provision, allowing Bell Atlantic to justify its inclusion in the tariff during the investigation.

IV. CONCLUSION

25. We have reviewed the *Suspension Order*, the applications for review, the Oppositions, and the replies. Based on our review, we find that the Bureau acted in accordance with the Communications Act, the Commission's Rules, and the prior Commission orders in initiating this investigation and partially suspending the carriers' tariffs. Accordingly, we affirm the *Suspension Order*.

V. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED that the applications for review filed by Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Bell Atlantic Telephone Companies, *et al.*, CC Docket No. 88-136, 6 FCC Rcd 1436 (Com.Car.Bur. 1991) (*Suspension Order*).

[2] "Dark," or "dry," fiber is unpowered cable the provision of which does not include the electronics that are necessary to power or "light" the fiber. Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634, 8645 n.7 (1989) (*ICB Order*).

[3] A list of the parties and filings in this proceeding and a key to the abbreviations used herein is contained in Appendix A.

[4] We will resolve the issues raised in the investigation by separate Commission order.

[5] DS3 service is a high-capacity special access service that provides capacity equivalent to 28 DS1 circuits or 672 voice-grade special access circuits. *ICB Order*, 4 FCC Rcd at 8645 n.2.

[6] *Id.* at 8642 (paras. 66-67).

[7] *Id.* at 8641 (para. 62).

[8] *Id.* at 8645 (para. 88).

[9] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 4842 (1990) (*Reconsideration Order*), *further recon. pending.*

[10] *Id.* at 4845 (paras. 31-33).

[11] The filing date for the tariffs was extended beyond that originally set in the *Reconsideration Order* to allow the Bureau to consider petitions for waiver filed by the four carriers. The Bureau denied those petitions in Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 6772 (Com.Car.Bur. 1990), *apps. for review pending.*

[12] *See Suspension Order*, 6 FCC Rcd at 1438 (para. 14).

[13] *Id.* at 1438-39 (para. 21).

[14] *Id.* at 1439 (para. 21). The Bureau subsequently modified the *Suspension Order* by clarifying that the carriers were allowed to provide volume discounts to their dark fiber customers as long as the carriers used the base rates listed in the Order to calculate any discounts. Bell Atlantic Telephone Companies *et al.*, CC Docket No. 88-136, Modification of Memorandum Opinion and Order (*Modification Order*), 6 FCC Rcd 1813 (Com.Car.Bur. 1991).

[15] *Suspension Order*, 6 FCC Rcd at 1440 (paras. 32-34).

[16] SWB Application at 10.

[17] *Id.* at 6-7.

[18] *Id.* at 7; SWB Reply at 4-5 (act of transmission, not capability, is the key to determining if jurisdiction exists). *But see* MFS Opposition at 4 (definition of "wire communication" is broad enough to encompass dark fiber).

[19] MFS Opposition at 6; WTG Opposition to BellSouth at 4.

[20] MFS Opposition at 5, *citing* In re Lightnet and Section 214 Application to Construct Fiber Optic System in Florida as Part of an Interstate Network (*Lightnet*), 58 RR 2d 182 (1985). *But see* SWB Reply at 7-8 (arguing that *Lightnet* never reached the question of whether dark fiber is regulated under Title II).

[21] Footnote 15 of the *Reconsideration Order* said:

> In light of the fact that carriers have filed tariffs for dark fiber service and thereby acceded to the Commission's jurisdiction, we need not address the question of our Title II authority to compel such carriers to file tariffs.

5 FCC Rcd at 4847 n.15.

[22] Bell Atlantic Application at 2-3; BellSouth Application at 5; SWB Application at 15.

[23] BellSouth Application at 7-8; SWB Application at 24-25; US West Application at 15.

[24] Bell Atlantic Application at 4; BellSouth Application at 9-11.

[25] SWB Application at 16.

[26] US West Application at 10-11. *But see* WTG Opposition to BellSouth at 5-6 (investigation helps ensure the availability of service at reasonable rates).

[27] *See, e.g.*, MCI Opposition to Bell Atlantic at 3; WTG Opposition to SWB at 5.

[28] *See, e.g.*, MCI Opposition to Bell Atlantic at 5. *But see* Bell Atlantic Reply at 2 (actual effect of an order, not intent, determines if a new rate structure was created).

[29] *See, e.g.*, WTG Opposition to Bell Atlantic at 2, *citing* New England Tel. & Tel. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987); Lincoln Tel. & Tel. Co. v. FCC (*Lincoln Tel*), 659 F.2d 1092 (D.C. Cir. 1980). *But see* BellSouth Reply at 5; US West Reply at 8 (WTG's cases involved the Commission's Section 4(i) authority, not its Section 204(a) authority).

[30] *Suspension Order*, 5 FCC Rcd at 1438-39 (paras. 20-23), 1441 (paras. 45-46).

[31] This language was added by a 1976 amendment of Section 204. Pub. L. 94-376, § 2, 90 Stat. 1080 (1976).

[32] North Dakota v. United States, 460 U.S. 300, 312 (1983); Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980); United States v. Oregon, 366 U.S. 643, 648 (1961); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

[33] *See* H.R. Rep. No. 1315, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 1926.

[34] *Modification Order*, *supra* note 4.

[35] SWB claims that the *Suspension Order* violates the Administrative Procedure Act (APA), 5 U.S.C. § 557, since SWB does not believe the Order fully explains the reasons for the choice of methodology to develop the "interim" rates. SWB Application at 25. We disagree. The Bureau provided an adequate explanation of the methods it used to determine the amount of the suspension in this case.

[36] *See Lincoln Tel.*, 659 F.2d 1092.

[37] BellSouth Application at 12. *See also* BellSouth Reply at 6 (by ordering that dark fiber be provided during the investigation, the Commission is prejudging the Section 214 proceeding).

[38] BellSouth Application at 13-14.

[39] *Id.* at 12-13. SWB states that until the *Suspension Order* it provided dark fiber service at prescribed bit rates, *e.g.*, 45 Mbps, 1.7 Gbps, and that all of its ICB arrangements contained a bit rate limitation. SWB Application at 13.

[40] US West Application at 12-13.

[41] EDS Opposition at 3-4; WTG Opposition to BellSouth at 4.

[42] MCI Opposition to BellSouth at 6.

[43] *Reconsideration Order*, 5 FCC Rcd at 4845 (para. 33).

[44] *See Suspension Order*, 6 FCC Rcd at 1440 (para. 32).

[45] *See id.* (para. 33).

[46] BellSouth Application at 14-15, *citing* American Telephone and Telegraph Co. and the Bell System Operating Companies Tariff F.C.C. No. 8, Transmittal No. 53, Exchange Network Facilities for Interstate Access (*ENFIA*), CC Docket No. 78-371, Order on Reconsideration, 93 FCC 2d 739 (1983); Lincoln Telephone and Telegraph's Duty to Furnish Interconnection Facilities to MCI Telecommunications Corporation, Declaratory Order, 72 FCC 2d 724 (1979). *See also* US West Reply at 2, *citing* FTC Communications Inc. v. FCC (*FTC Communications*), 750 F.2d 226, 232 (2d Cir. 1984); *Lincoln Tel.*, 659 F.2d at 1107 (D.C. Cir. 1981); ENFIA.

[47] MCI Opposition to BellSouth at 6-7 (arguing that the cases cited by BellSouth involve Commission action under Section 4(i) of the Act).

[48] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration*); *petitions for further recon. pending, appeal docketed*, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[49] SWB Reply at 17-18; US West Reply at 11-12.

[50] WTG Opposition to SWB at 4; WTG Opposition to US West at 4.

[51] MCI Opposition to US West at 4.

[52] *LEC Price Cap Order*, 5 FCC Rcd at 6810 (paras. 192-93).

[53] *Id.* at 6824-25 (para. 314). New services are temporarily held outside of price caps in order to collect historical demand data, and then are included in price cap regulation.

[54] *LEC Price Cap Order*, 5 FCC Rcd at 6825 (paras. 315-21).

[55] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2494-95 (paras. 126-129) (adopting an interim rule requiring additional data, pending the outcome of the *Part 69/ONA* proceeding); Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rule Making, FCC 91-186 rel. July 11, 1991 (*Part 69/ONA Order*), at paras. 24-44.

[56] Bell Atlantic Application at 8.

[57] *Id.* at 6.

[58] MCI Opposition to Bell Atlantic at 5-6.

[59] *Id.* at 6.

[60] *Reconsideration Order*, 5 FCC Rcd at 4845 (para 33).

APPENDIX A
Listing of Applications for Review, Oppositions, and Replies

Applications for Review

1. Bell Atlantic Telephone Companies (Bell Atlantic), Application for Review (Bell Atlantic Application), filed March 22, 1991.

2. BellSouth Telephone Companies (BellSouth), Application for Review (BellSouth Application), filed March 25, 1991.

3. Southwestern Bell Telephone Company (SWB), Application for Expedited Review and Petition for Stay (SWB Application), filed February 27, 1991.

4. US West Communications, Inc. (US West), Application for Review (US West Application), filed March 4, 1991.

Oppositions

1. EDS Corporation (EDS), Opposition to BellSouth Application for Review (EDS Opposition), filed April 9, 1991.

2. MCI Telecommunications Corporation (MCI), Opposition to Application for Review of Bell Atlantic Telephone Companies (MCI Opposition to Bell Atlantic), filed April 8, 1991.

3. MCI, Opposition to Application for Review of BellSouth Telephone Companies (MCI Opposition to BellSouth), filed April 9, 1991.

4. MCI, Opposition to Application for Review of US West Communications, Inc. (MCI Opposition to US West), filed March 19, 1991.

5. Metropolitan Fiber Systems, Inc. (MFS), Opposition to Southwestern Bell Telephone Company's Application for Expedited Review and Petition for Stay (MFS Opposition), filed March 14, 1991.

6. Williams Telecommunications Group, Inc. (WTG), Opposition to Application for Review of Bell Atlantic Telephone Companies (WTG Opposition to Bell Atlantic), filed April 8, 1991.

7. WTG, Opposition to Application for Review of BellSouth Telephone Companies (WTG Opposition to BellSouth), file April 9, 1991.

8. WTG, Opposition to Application for Expedited Review and Petition for Stay of Southwestern Bell Telephone Company (WTG Opposition to SWB), filed March 14, 1991.

9. WTG, Opposition to Application for Review of US West Communications, Inc. (WTG Opposition to US West), filed March 19, 1991.

Replies

1. Bell Atlantic, Reply to Oppositions (Bell Atlantic Reply), April 23, 1991.

2. BellSouth, Reply (BellSouth Reply), field April 24, 1991.

3. SWB, Reply to Opposition (SWB Reply), filed May 6, 1991.

4. US West, Reply to Oppositions (US West Reply), filed May 6, 1991.

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; Bell Atlantic Telephone Companies, *et al.*, Investigation of Local Exchange Carriers' Dark Fiber Rates

These items fail to resolve the threshold jurisdictional question raised by petitioners: is dark fiber a communications service subject to regulation under Title II of the Communications Act?[1] Accordingly, I dissent.

FOOTNOTE TO THE STATEMENT

[1] 47 U.S.C. §§201-224.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-236

In re Application of

WXBM-FM, INC. File No. BRH-881003UT

For Renewal of License of
Station WXBM-FM
Milton, Florida

HEARING DESIGNATION ORDER

Adopted: August 1, 1991; Released: August 2, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it: (i) The above-captioned license renewal application for Station WXBM-FM, Milton, Florida filed on October 3, 1988 by WXBM-FM, Inc. (licensee) (File No. BRH-881003UT); (ii) a petition to deny the renewal filed on January 3, 1989 by the Florida State Conference of Branches of the NAACP and the National Black Media Coalition (NAACP/NBMC); (iii) the opposition to the petition to deny filed by the licensee on February 3, 1989; (iv) the Commission's inquiry letters; (v) the NAACP/NBMC's reply comments and additional pleadings; and (vi) the licensee's responses to NAACP/NBMC's comments.[1]

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with (the public interest, convenience, and necessity)." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Dubuque T. V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Although NBMC joined with the NAACP in filing the petition to deny, NBMC is not a party in interest. NBMC timely submitted a statement from Pluria Marshall, Chairman of the NBMC and a resident of the Washington, D.C., metropolitan area. However, the Commission has previously held that the statement of a person who does not claim to be a listener of the challenged station nor a resident of its service area does not satisfy the requirement of the Act. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that NBMC lacks standing to file a petition against WXBM-FM. We will treat NBMC's petition as an informal objection.

4. The Santa Rosa Branch of the NAACP timely submitted a statement from Mr. Wayne Hodrick, President of the Santa Rosa Branch, a local resident and regular listener to Station WXBM-FM. In a letter filed on October 4, 1990, WXBM-FM submitted an affidavit from Mr. Hodrick in which he states that "WXBM's efforts have improved dramatically since January 1989 . . .," that he was pleased that four Blacks were hired at WXBM since January 1989, and that "[t]herefore, the Santa Rosa Branch, NAACP, now supports a grant of [WXBM's] renewal of license application." By a letter filed November 6, 1990, however, David Honig, Esquire, Counsel for the NAACP, stated that Mr. Hodrick did not have the authority to withdraw a petition to deny without the consent of the Legal Department of the NAACP which he did not have at the time he signed the October 4, 1990 statement. The letter also includes an affidavit from Mr. Hodrick in which he revokes his October 4, 1990, statement and expresses the Santa Rosa Branch of the NAACP's continued support for the denial of the WXBM-FM license renewal application.[2] Accordingly, we hold that the challenge raised by the Santa Rosa Branch of the NAACP constitutes a valid and continuing petition to deny.

5. For the reasons which follow, we find an evidentiary hearing is needed to resolve substantial and material questions of fact as to whether WXBM-FM, Inc. has the requisite qualifications to remain a Commission licensee. The issues involved relate to possible misrepresentation in the licensee's renewal application and possible failure to ensure equal employment opportunity in every aspect of its employment policy and practice.

II. BACKGROUND

6. On October 3, 1988, WXBM-FM, Inc. filed an application to renew the license of Station WXBM-FM, Milton, Florida. In its renewal application, the licensee indicated that it had contacted five general recruitment sources during the reporting year, and of these, only one source, a newspaper, produced a minority referral.[3] The licensee also indicated that from September 1, 1987, through August 31, 1988, it had six vacancies, all of which were filled by non-minority women, and represented that the available minority labor force in its area was 6.6%. The Florida State Conference of Branches of the NAACP and the National Black Media Coalition filed a petition to deny Station WXBM-FM's renewal application. In its petition, NAACP/NBMC assert that the licensee's EEO program reflected no minority hires, no minority recruitment sources, no minority referrals, and no explanation for the station's failure to report any minority employees throughout the renewal term. In addition, they assert that the station used alternative county minority labor force data of 6.6% when the correct minority labor force data should be that of the Pensacola MSA --17.5%. NAACP/NBMC request that the Commission conduct a "*Bilingual*" investigation, designate the station's application for a hearing, "and, based on evidence adduced at [the] hearing, . . . deny the application."

7. In its opposition, the licensee acknowledges that the EEO program implemented when it acquired the stations in 1984 has not resulted in minority hires.[4] The licensee attributes its shortcomings to the fact that "WXBM-FM is

a relatively small station, with only seventeen full-time and two part-time employees," that few employees were hired during the reporting year, and that "WXBM-FM is located in a rural area, thirteen miles from Pensacola city line, and inaccessible to public transportation." In addition, the licensee acknowledges that its EEO efforts should be evaluated in light of labor force statistics for Pensacola (17.5% minority), the MSA in which the station is located, and not for Santa Rosa County (6.6% minority), the county in which the station is located. In response to NAACP/NBMC's contention that the licensee did not contact any minority recruitment sources, the licensee argues that the sources that it did contact are potential sources for minority recruitment and that just because these sources produced only one minority referral in the past does not mean that they will not be more productive in the future. Moreover, the licensee states that it began taking steps to intensify its minority recruitment efforts after the petition was filed. These efforts include seeking advice from the local NAACP president and contacting several new sources including the Santa Rosa and Escambia Job Corps and Pensacola Junior College. These efforts resulted in the hiring of a minority, referred by the local NAACP, for a lower-level position commencing on February 1, 1989 -- the last day of the license term.

8. To evaluate further the licensee's EEO efforts, the staff sent a letter to the licensee requesting recruitment and hiring information from October 1, 1984, through October 1, 1988.[5] In addition to other information, we specifically asked for the number of persons interviewed for each position, indicating those that were minority and female, and the recruitment sources used to attract applicants for each of the positions. The licensee's response reflected the number but not the race or gender of applicants. It also included the recruitment source of the successful applicant but not all the recruitment sources contacted for each position.[6] The President/General Manager states in the response that he kept no records regarding race or gender of applicants because he thought it was against the law to do so.[7] Also, in its inquiry response, the licensee indicated that it had 19 total hires during the reporting year, not six as stated in its renewal application. It explained this disparity was due to "either an inadvertent failure to include some of the employee hires when compiling information for the EEO report, or a clerical error in transferring the data to the final EEO report." The staff dispatched a second letter of inquiry requesting any information regarding the race and gender of applicants that could be reconstructed by anyone involved in the hiring process and again asking for all recruitment sources contacted for each position filled. In the licensee's second response, the President/General Manager indicated that he interviewed only the successful job applicant for most of the positions. In addition, he also stated that "[t]o the best of my recollection, we had no applicants, during the period in question, who were black, Hispanic or oriental. It is possible that we had Native American applicants without being aware of the fact." Regarding recruitment sources, the licensee only stated that, in addition to the sources already listed in its first inquiry response, it also maintained an ongoing employment notice at the University of West Florida.[8]

9. In its reply and subsequent pleadings, NAACP/NBMC comment on the information contained in the licensee's opposition and its inquiry responses. Quoting the station's minority employment statistics, NAACP/NBMC state that there is no way that these statistical results could have been obtained absent intentional discrimination. *See infra* note 13. They also mention the discrepancy in the station's reporting of hires which we will address later.[9] In addition, they state that the station appears to have done nothing to change its ways. Given the above-cited factors, NAACP/NBMC again request that the Commission designate this application for hearing.

10. Because of the discrepancy in the number of hires for the reporting year stated in the renewal application and first inquiry response as well as the disparity between the recruitment sources listed as contacted in its renewal application and its inquiry responses, we sent a third inquiry letter to the licensee requesting an explanation for the discrepancies. In its reply, the licensee states again that the hiring data discrepancy was due to a clerical error. Specifically, the licensee indicates that it was due to "the person in charge of compiling the information and completing the form [thinking] that only females and minorities should be listed, not all employees." The licensee also states that, although it previously reported no minority employees during the period under review, it recently discovered that the station had employed two persons of American Indian descent.[10] Regarding recruitment sources, the licensee explains that the sources listed in its first inquiry response were the referral sources of the hirees rather than all sources used to recruit for any particular position. The licensee then lists all the sources mentioned in its renewal application plus an additional source, Job Services of Florida. Lastly, the licensee states that although all of these sources were not used for every opening, they were generally used.

11. In response, NAACP/NBMC comment on the licensee's explanation for the hiring discrepancy. They state that the explanation "is preposterousness [sic], since the renewal application form is unambiguous in asking for total hires." Moreover, NAACP/NBMC contend that even if such a clerical error had been made, " . . . the correct responses would have been *eight* women, not six, as full-time hires, and five women, not three, as top four category (salesperson) hires." They also discuss another disparity in the licensee's pleadings. They point out that, whereas the original renewal application lists the number of female referrals from employees as 20, the revised renewal application submitted with the third inquiry response lists the number as zero. NAACP/NBMC argue that "nothing but deliberate falsification and puffery . . . " could explain such a large error. As to the licensee's claim that it had two Native American employees, NAACP/NBMC maintain that it should be given no weight, arguing that "[t]he fortuitous and hitherto unknown presence of some Native American lineage . . . tells nothing about whether the licensee obeyed the EEO Rule."

12. The licensee's response includes an affidavit from the clerk who incorrectly recorded the number of hires on the renewal application. In her affidavit, the clerk explains that she thought that the renewal application asked for only minority and female full-time hires. Moreover, she gives a detailed explanation for the further discrepancy described by NAACP/NBMC in paragraph 11, *supra*.[11] The licensee's response also includes an affidavit from Louis Mahacek, the President/General Manager of Station WXBM-FM, to explain the discrepancy between the number of female referrals from employees as reported in the original renewal application and as reported

in the revised renewal application. Mr. Mahacek states that he changed the number of female referrals from 20 to none because he is unable to locate either the person who reported the referral figures in the original application or any evidence that such referrals were made. He states that although he has no reason to doubt the accuracy of the clerk's figures, "without any documentation in [the station's] files to verify that any female applicants were referred by incumbent employees, [he] could not represent to the Commission that any were [referred]...."

13. We find that the overall record raises questions as to the licensee's qualifications to remain a licensee. For the reasons set out in greater detail below, we believe that a hearing is needed to resolve these questions.

III. DISCUSSION

EEO Implementation

14. We believe that a substantial and material question exists as to whether the station complied with Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080(b), which states that "[e]ach broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." According to the licensee's renewal application, the licensee contacted only general recruitment sources including a general circulation newspaper, employment agencies, two schools, and an advertising agency from September 1, 1987, through August 31, 1988. Additional sources contacted from October 1, 1984, through October 1, 1988 included a school of broadcasting, a radio station, a client, and a television station. During this period, the station had 61 full-time hiring opportunities. It is unclear how often the station contacted the above-noted sources for these vacancies because the licensee only listed the referral source of the successful applicant. Although the licensee states that it usually contacted the sources listed in its renewal application when openings occurred, it appears from the data that 26 of the 61 hirees initiated contact with the station during the four year period under review. Moreover, the licensee listed only one minority referral in its renewal application. For 50 of the 61 hires, the licensee interviewed only one person -- the successful applicant. It interviewed no Blacks and could recall no Black applicants. Further, no Blacks were hired for any of the 61 positions. In addition, the Annual Employment Reports show that no Blacks have been employed at the station, full or part-time, since the existing licensee took over in 1984. Lastly, the licensee indicated in its third inquiry response that during the last year of the license term it did hire two minorities "of Native American descent . . . ."[12]

15. Although the licensee attributes its poor EEO performance to its station size, its few hiring opportunities, and its rural location, these three factors are applicable to the recruitment of all applicants, minority and non-minority. We question the licensee's self-assessment of its EEO efforts when it attributes its poor EEO performance to the factors cited above and ignores the fact that its list of recruitment sources referred no Black applicants to the station in four years and it made no efforts to alter or improve these sources. While viewed by themselves these facts would not necessarily lead us to designate for hearing, in light of the overall circumstances of this case, particularly the numerous inconsistent responses, we find that a hearing is necessary to determine whether the licensee complied with Section 73.2080(b) of the Commission's Rules.

Misrepresentation/Lack of Candor

16. Our review of the licensee's renewal application, its opposition, and its inquiry responses revealed significant disparities in the hiring information that it filed with the Commission. The licensee states in its renewal application that it hired six new employees, all female, during the reporting year, *i.e.*, the year preceding the filing of its renewal application. However, in the licensee's first inquiry response, it lists eight females and 11 males for a total of 19 full-time hires -- a far greater number of vacancies than it reported in its renewal application. We find that the licensee's explanation that a clerk misinterpreted the renewal application form as not asking for total hires to be patently inadequate. The renewal application clearly asks for the number of total hires during the reporting year, as well as the number of women and minority hires. In addition, the application requires a signature of an official of the licensee, in the instant case the President/General Manager, certifying that "to the best of [his] knowledge, information, and belief, all statements contained in this report are true and correct." Thus, even if the clerk misinterpreted the form, the President/General Manager should have been aware that the number of hires during the reporting year was significantly greater than six and should have corrected the error before signing the application. We are particularly troubled by the magnitude of the discrepancy: the correct figure was actually three times greater than the figure originally reported. In evaluating a licensee's efforts, the number of hiring opportunities is significant in determining whether a licensee exerted best efforts to attract qualified minority and female applicants. Thus, the low number of hires combined with the low minority labor force reported by the licensee in its original renewal application could have been designed to diminish the significance of its poor performance and allay any concern by the Commission in this area. In addition, we are troubled that only after three inquiries from the Commission did the licensee provide a reply that was fully responsive to our request for all recruitment sources contacted for each position filled. Moreover, the disparity in the number of female referrals listed in the original renewal application and the revised application raises concerns. Although the licensee states that it changed the figures because it could find no record of the referrals, this discrepancy is yet another questionable aspect of the licensee's EEO program that should be further investigated in a hearing. Given these circumstances, we find that a hearing is necessary to determine whether, and if so, the extent to which the licensee engaged in misrepresentation to or lack of candor with the Commission regarding the above matters in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015.

Discrimination[13]

17. In *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*), the court noted that evidence of discrimination includes

> the substantial underrepresentation of Blacks at the stations and the inadequacy of the licensee's explanation for it; the inconsistencies or misstatements

contained in the licensee's communications with the Commission; and the licensee's deficient EEO record.

Id. at 507.

The court held that such evidence "raises questions as to whether the licensee engaged in intentional racial discrimination in employment", *Id.* at 507, and directed the Commission "to hold a hearing to resolve the question both about actual discrimination and about the licensee's failure to meet its affirmative action obligations." *Id.* at 510.

18. We find that the factors outlined in *Beaumont* are present in the instant case. As we noted in paragraph 14 *supra*, the licensee employed no Blacks during its entire tenure and hired no Blacks notwithstanding 61 hiring opportunities. Despite the absence of Black employees, Black interviewees, or Black applicants during the license term, the licensee failed to seek to improve its EEO program by contacting recruitment sources likely to refer minority applicants. It also failed to provide an adequate explanation for its shortcoming or to even acknowledge the existence of a problem with its EEO efforts. Significantly, as in *Beaumont*, substantial and material questions of fact exist regarding the licensee's representations to the Commission on the discrepancies in reporting hire and referral data. In its renewal application, the licensee incorrectly reported the number of total and upper-level hires, total and upper-level female hires, total and upper-level minority hires occurring during the reporting year as well as the applicable minority labor force. Moreover, the President/General Manager attributes the incorrect hiring figures to mere clerical error when he, as General Manager of 19 employees, was in a position to know of the significant changes in his staff. In addition, the licensee retracted its representation regarding a significant number of female referrals listed in its renewal application and did not confirm having contacted all the recruitment sources listed in its renewal application until its third inquiry response.

19. In sum, the licensee's submissions raise questions as to whether the licensee misrepresented the extent of its affirmative action plan by filing inconsistent information with the Commission. They also raise questions as to whether the licensee attempted to conceal the substantial statistical disparity between the station's minority employment and available minority labor force. Finally, the licensee's submissions raise questions as to whether the licensee failed to follow the Commission's affirmative action rule and if it did so fail, whether the failure was a result of inadvertence or intentional discrimination. *See Bilingual-Bicultural Coalition on Mass Media v. Federal Communications Commission*, 595 F.2d 621, 630 (D.C. Cir. 1978). Accordingly, we find that this renewal application should be designated for hearing.

20. *IT IS ORDERED* that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(e), the above-captioned application *IS DESIGNATED FOR HEARING* at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine the extent to which the licensee of Station WXBM-FM complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080(b);

(2) To determine whether the licensee of Station WXBM-FM made misrepresentations of fact or was lacking in candor or violated Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015 with regard to the station's 1988 renewal application's EEO program and documents submitted in support thereof;

(3) To determine whether the licensee of Station WXBM-FM discriminated in its employment practices against Blacks in violation of Section 73.2080(a) of the Commission's Rules, 47 C.F.R. Section 73.2080(a);

(4) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal application would serve the public interest, convenience and necessity.

21. IT IS FURTHER ORDERED that the National Black Media Coalition and the Santa Rosa Branch of the NAACP are made parties to the hearing ordered herein.

22. IT IS FURTHER ORDERED that if it is determined that the hearing record does not warrant an Order revoking the license of WXBM-FM, Inc., for Station WXBM-FM, it shall also be determined if WXBM-FM, Inc. has willfully or repeatedly violated Section 73.1015 (submitting truthful written statements and responses to the Commission) and 73.2080 (EEO) of the Commission's Rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in the amount of $20,000 for the willful or repeated violation of Sections 73.1015 and 73.2080 of the Commission's Rules.

23. IT IS FURTHER ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Acordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

24. IT IS FURTHER ORDERED that, in accordance with Section 309(e) of the Communications Act, as amended, the burden of proceeding with the introduction of the evidence upon issues (1), (2), and (3) and the burden of proof with respect to all issues shall be upon the licensee WXBM-FM, Inc.

25. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard, the parties respondent herein, pursuant to Section 1.221 of the Commission's Rules, 47 C.F.R. Section 1.221, file with the Commission, within twenty (20) days of the mailing of this Order, a written appearance in triplicate, stating an intention to appear on the date filed for the hearing and present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED that WXBM-FM, Inc. shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 311(a)(2), and Section 73.3594 of the Commission's Rules, 47 C.F.R. Section 73.3594, give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594 of the Commission's Rules.

27. IT IS FURTHER ORDERED that the Secretary send by Certified Mail-Return Receipt Requested, one copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] Although Section 1.45 of the Commission's Rules, 47 C.F.R. Section 1.45, does not authorize the additional pleadings filed by either party subsequent to NAACP/NBMC's reply pleadings, we will consider the submissions in this case as part of our public interest analysis. 47 U.S.C. 309(a).

[2] Mr. Hodrick states that he did not know that Lou Mahacek, the President/General Manager of the station, would be filing the affidavit with the Federal Communications Commission. He adds that he also was not aware that a broadcast licensee's behavior after the filing of a petition to deny does not mitigate the licensee's violations during the license term.

[3] The race or national origin of the minority referral was never indicated in the licensee's submissions to the Commission.

[4] The licensee did point out that, contrary to NAACP/NBMC's statement, it listed one minority referral in its renewal application. The race of the minority referral is unknown.

[5] The existing licensee acquired the station on August 7, 1984.

[6] The licensee makes no mention in his first response of contacting three of the recruitment sources listed in its renewal application. However, it does mention contacting additional sources not referenced in its renewal application during the license term including a school of broadcasting, a radio station, a client, and a television station.

[7] The President provides no explanation for his belief. As indicated in a previous Commission order, the Equal Employment Opportunity Commission has long recognized that such information may be collected pursuant to an affirmative action plan. *See discussion of authorities in Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 4 FCC Rcd 1715, 1716 (1989) (request for clarification by the National Association of Broadcasters (NAB)), *aff'g in part* 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*.

[8] The licensee still made no mention of contacting two sources listed in its renewal application.

[9] *See infra* para. 16. NAACP/NBMC mention the discrepancy specifically in connection with females. They state that, while the licensee's EEO application reflected six hires during the reporting year, all of whom were females, the licensee actually hired a much larger number of employees, the majority of whom were men.

[10] The licensee claims that these two individuals were hired during the last year of the license term and that one was hired during the period under review.

[11] She states in her affidavit that one upper-level female hire was mistakenly not counted because she only worked at the station for two months and another upper-level female hire was mistakenly not counted because she was a rehire.

[12] It appears that the licensee was unaware that it employed two individuals of American Indian descent until after our third inquiry. Thus, it is not apparent that there is any correlation between the hiring of these individuals and any licensee EEO program. Furthermore, although part of our analysis includes evaluating the aggregate number of minorities at the station with the aggregate number of minorities in the labor force, we focus primarily on the station's efforts regarding the dominant minority in the labor force. *Bilingual-Bicultural Coalition of Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621, 625 (D.C. Cir. 1978). Blacks are the dominant minority in the Pensacola, Florida MSA, representing 14.3% of the labor force, as compared to American Indians, who comprise only 1.1% of the available labor force.

[13] In its reply, the NAACP/NBMC discusses the application of a statistical comparison described in *Wards Cove Packing Co. v. Antonio*, 109 S.Ct. 2115 (1989) (*Wards Cove*), to cases arising before the Commission. In *Wards Cove*, the Court stated that, under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000(e) *et seq*, the plaintiff seeking to establish a *prima facie* case of discrimination using statistical disparities in the employer's workforce must show a causal link between specifically identified employment practices and any observed statistical disparity. *Id.* at 2124. Arguing that if this high standard also applies under the FCC Rules, NAACP/NBMC maintain that it will be difficult, if not impossible, to establish such a causal link without a hearing before the Commission. As we stated in *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709, n.4 (1990), *Wards Cove* dealt specifically with Title VII, not with the FCC EEO rules. Notwithstanding *Wards Cove*, we find that many factors of the licensee's record, including but not limited to statistical disparities, raise substantial and material questions of fact sufficient to warrant a hearing in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy Regarding Character Qualifications in Broadcast Licensing

Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications

ORDER

Adopted: July 31, 1991; Released: August 1, 1991

By the Commission:

1. The Commission herein grants, in part, three petitions for stay of broadcast character reporting requirements imposed in this proceeding. *See Policy Statement and Order* (the *1990 Character Policy Statement*), 5 FCC Rcd 3252, 55 Fed. Reg. 23082 (1990), *reconsideration granted in part*, 6 FCC Rcd 3448, 56 Fed. Reg. 25633 (1991) (the *1991 Character Reconsideration Order*). The stay petitions were filed by: the National Broadcasting Company, Inc.; Cox Enterprises, Inc., Cosmos Broadcasting Corporation, and A.H. Belo Corporation; and Capital Cities/ABC, Inc. and the Times Mirror Company.[1]

2. The petitioners request a stay, pending reconsideration,[2] of those broadcast character reporting obligations that require: (1) licensees to report adjudications of relevant misconduct within 90 days of learning of such adjudications; (2) renewal applicants, assignors and transferors to report in their applications pending litigation regarding relevant misconduct; (3) new applicants, assignees and transferees to report in their applications pending litigation regarding relevant misconduct; and (4) licensees and applicants to provide litigation-related information regarding any entities in which persons holding attributable interests in the licensee or applicant also hold an attributable interest.[3] Petitioners allege that these reporting requirements impose a significant burden on them, and that failure to fulfill their reporting obligations could place a station's authorization in jeopardy.

3. Although petitioners' showing does not necessitate a stay, *see Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), in our discretion we have decided to grant partial relief. While we continue to believe that the *1990 Character Policy Statement* and the *1991 Character Reconsideration Order* reasonably identified those matters relevant to broadcast licensing proceedings, and we remain vigorously committed to enforcement of those policies, it was not our intent to impose unwarranted reporting burdens on licensees and applicants. In this regard, petitioners have raised questions as to whether the significance of some of the matters required to be reported is sufficient to justify the burden involved in preparing the reports.

4. In these circumstances, we will stay the requirements that licensees report final adjudications of relevant misconduct within 90 days of such adjudications and that renewal, assignment and transfer applications include reports of pending litigation involving the renewal applicant or the assignor or transferor. These requirements were first imposed in the *1990 Character Policy Statement* and the *1991 Character Reconsideration Order*.

5. In contrast, the requirement that new applicants and assignees or transferees report relevant pending litigation, including litigation involving all entities in which persons with an attributable interest, in the applicant or licensee also hold an attributable interest were not imposed or modified in either the *1990 Character Policy Statement* or the *1991 Character Reconsideration Order*. As these requirements predate our actions in this proceeding, we see no reason to grant the requested stay of their continued effectiveness.

6. Finally, it is our firm intention to resolve the matters raised in the petitions for further reconsideration in this proceeding as expeditiously as possible. Thus, although the partial stay granted herein will remain in place until the Commission has resolved those matters, we do not expect that this action will create a prolonged hiatus in the reporting requirements, and as noted above (*see* ¶ 3), this action should not be viewed as an intent by the Commission to weaken its commitment to strong broadcast character policies.

7. Accordingly, IT IS ORDERED that the Petitions for Stay filed by the National Broadcasting Company, Inc.; Cox Enterprises, Inc., Cosmos Broadcasting Corporation, and A.H. Belo Corporation; and Capital Cities/ABC, Inc. and the Times Mirror Company ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects.

8. The action herein is taken pursuant to section 4(i), 303(r), 308(b), 312, and 319(a) of the Communications Act of 1934, as amended.

For further information regarding this proceeding, contact Martin Blumenthal, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Supporting pleadings were filed by: Great American Television and Radio Company, Inc.; McGraw-Hill Broadcasting Company, Inc.; The New York Times Company and Renaissance Communications Corporation; and Paramount Communications, Inc.

[2] In addition to petitions for reconsideration filed by the stay petitioners and their supporters, three other petitions for reconsideration were filed.

[3] As to such "outside" adjudications and litigation, the petitioners do not request a stay of the reporting requirements where the licensee principal is a named defendant in such actions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier
Association, Inc.

Petition for Waiver of Equal Access
Balloting Requirements

ORDER

Adopted: July 29, 1991; Released: July 30, 1991

By the Chief, Common Carrier Bureau:

1. On June 27, 1991, the National Exchange Carrier Association, Inc. (NECA) filed a petition for waiver requesting that the Commission waive the 90-day and 50-day requirements for mailing of the initial and second equal access ballots set forth in the *Allocation Order*.[1] The waivers are requested to enable Minnesota Independent Equal Access Corporation (MIEAC) and its 64 local exchange carriers (LECs) to conduct a single, consolidated ballot. No comments were filed.

2. On April 23, 1991, MIEAC filed its interstate access tariff setting forth the initial rates and regulations for its Centralized Equal Access Service. NECA Petition at 2. NECA states that the MIEAC system will provide centralized equal access service to 252 end offices served by the 64 LECs. *Id.* According to NECA, MIEAC plans to convert the 252 end offices to equal access in clusters over a six-month period, commencing January 30, 1992.

3. NECA maintains that the equal access balloting process can be most efficiently and economically completed on a consolidated, system-wide basis. *Id.* at 3. It contends this will permit MIEAC's interexchange carrier customers to determine, at a single early date, the nature and size of their initial end user customer base, and thereby enable them to make the necessary plans and obtain the requisite facilities to carry the resulting interexchange traffic. NECA suggests that a consolidated ballot will also permit MIEAC to determine the identity and estimated traffic of its interexchange carrier customers at the same early date and to make certain that it has sufficient facilities in place to serve them at their designated interconnection points. *Id.*

4. In addition, NECA contends that it will save MIEAC the added time and expense of canvassing potential interexchange carrier customers concerning their continuing desire to appear on MIEAC's equal access ballots, and the effort and costs of preparing, mailing and processing separate ballots. NECA argues that a consolidated balloting process will minimize confusion among end user customers, who would otherwise wonder why their exchanges were not receiving ballots at the same time as other exchanges served by the MIEAC system. *Id.* NECA states that to reduce potential confusion on the part of end users, however, the MIEAC companies have agreed to provide an additional notification to end users whose serving end office are converted to equal access more than 30 days after centralized equal access service initially becomes available. *Id.* at 4.

5. The Bureau has reviewed NECA's petition for waiver and concluded that the arguments set forth above together with MIEAC'S commitment to provide an additional notification to end users provides good cause for waiver of the 90-day and 50-day requirements for mailing equal access ballots.

6. Accordingly, IT IS ORDERED that the petition for waiver filed by the National Exchange Carrier Association, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911, *modified on recon.*, 102 FCC 2d FCC 503 (1985) (*Allocation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3084

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: July 18, 1991; Released: July 19, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3084 to modify Virtual Telecommunications Network Service (VTNS) Option 17, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The modifications to Option 17 add calling from specified international locations to the United States, add 45 Mbps data transmission capabilities (DTCs), modify the switched access charges, the Type II authorization code charges, and the calling matrix to reflect the new international calling capability, introduce an international usage volume pricing plan, reduce the basic charge from $369,000 to $362,058 per month, introduce certain promotional features, and establish new rate schedules D and E. This transmittal also modifies certain regulations concerning the minimum annual charge (MAC), the domestic usage volume pricing plan, the change charges provisions, and the domestic DTC and voice transmission capability (VTC) volume pricing plan, and introduces an international DTC and VTC volume pricing plan. *See* AT&T Transmittal No. 3084 Description and Justification at 2-3, 6. Transmittal 3084 is scheduled to take effect on July 20, 1991.

2. Williams Telecommunications Group, Inc. (Williams), filed a petition to reject or suspend and investigate the Option 17 modifications on May 21, 1991. AT&T filed a reply on May 30, 1991.

3. Williams argues that a comparison of the proposed revisions to Option 17 and the recently filed modifications to Option 33 reveals that AT&T selectively enforces Tariff 12 with respect to the two customers for Option 17 and Option 33. Williams Reply at 2-4. Williams contends that the Option 17 modifications raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *Id.* at 5, 21. Williams also argues that AT&T has failed to demonstrate that Option 17 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 17 and AT&T's other services. *Id.* at 6-13 (also arguing that AT&T's demand and revenue analysis is flawed). Williams further alleges that even if Option 17 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. *Id.* at 13-15.

4. Williams then argues that by bundling 800 service with other Tariff 12 services, Option 33 allows AT&T to take advantage of the lack of number portability and effectively precludes a customer from leaving AT&T. *Id.* at 15-17. Finally, Williams contends that modified Option 17 violates the Commission's policy against geographic rate deaveraging, that it is not generally available, and that it and Tariff 12 packages violate the Commission's *Private Line Guidelines*. *Id.* at 18-21.

5. AT&T replies that no change has been made to the basic structure of Option 17. AT&T Reply at 1. AT&T asserts that claims by Williams that this filing is unlawful, based on the fact that AT&T has not reduced the minimum annual charge for Option 17, as it did for VTNS Option 33, are frivolous. *Id.* at 23. Further, says AT&T, Williams' claims that AT&T's demand and revenue analysis is flawed, are unfounded. *Id.* at 4.

6. In response to Williams' claims of discrimination, bundling, "likeness" among options, and lack of general availability, AT&T maintains that these claims have been raised without success in previous VTNS filings and insists that "Williams' repetitious claims provide no basis for any different treatment of these revisions to Option 17." *Id.* at 5-6. AT&T also insists that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued a number of orders allowing VTNS options to become effective since the release of the decision by the U.S. Court of Appeals in the *Tariff 12 Remand*. *Id.* at 5. Therefore, AT&T asserts that the most the Commission should do is make the Option 17 modifications subject to the outcome of the remand proceeding. *Id.* at 6.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3084, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3084 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3084 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3084 filed by Williams Telecommunications Group, Inc., IS DENIED.

[1] *MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 24, 1991

BELL ATLANTIC AND NYNEX FILE PETITIONS FOR WAIVER REGARDING LIDB ACCESS SERVICE

Pleading Cycle Established

On April 15, 1990, New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition for waiver of Sections 69.305 and 69.306 of the Commission's Rules, 47 C.F.R. §§ 69.305, 69.306. Specifically, NYNEX seeks a waiver of the Commission's access cost allocation rules, in order to reallocate certain costs which NYNEX claims are associated with its Line Identification Data Base (LIDB) from switched access to billing and collection. On June 24, 1991, Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish three new switched access rate elements for the purpose of providing a transport service to its LIDB.

Interested parties may file comments regarding the NYNEX petition or the Bell Atlantic petition for waiver no later than August 9, 1991. Reply comments may be filed no later than August 16, 1991. Parties commenting on both petitions should file two separate pleadings, each focusing on the issues raised by that petition.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the waiver petitions and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-27

In the Matter of

Amendment of Section 73.202(b), RM-7549
Table of Allotments,
FM Broadcast Stations.
(Castle Rock, Washington)

ORDER STAYING FILING WINDOW

Adopted: August 1, 1991; Released: August 2, 1991

By the Chief, Allocations Branch:

1. The Commission, on its own motion, stays the opening of the July 23, 1991 to August 22, 1991, filing window for Channel 296C3 at Castle Rock, Washington. Both the allotment and filing window were established in the *Report and Order* in this proceeding released June 7, 1991. *See* 6 FCC Rcd 3366 (1991).

2. At the time the Commission sought comments on the Castle Rock allotment, the Commission also had pending before it the request of Michael T. McKenna to allot Channel 297C3 to Ilwaco, Washington. Ilwaco and Castle Rock are located 87.8 kilometers apart, while the Commission Rules require a 99 kilometer minimum distance separation for first-adjacent Class C3 allotments. The Ilwaco petition was not considered as a counterproposal to Castle Rock because the staff found that a site restriction of 12.7 kilometers (7.9 miles) west of Ilwaco could be imposed to avoid the conflict. *See* 6 FCC Rcd 2460 (1991). It has now come to our attention, however, that the Ilwaco site restriction places the allotment off shore. Thus, the allotments are in conflict. Therefore, because the Ilwaco petition was timely filed to be considered with the Castle Rock proposal, and we are unable to identify an alternate Class C3 channel for allotment to Castle Rock or Ilwaco, we are staying the opening of the filing window to allow for further consideration of the two proposals.

3. Although the filing of an application does not preclude a subsequent deletion of the underlying channel allotment, we recognize that considerable time and expense by the applicants go into preparing and filing an application. In this situation, we believe that it is preferable to delay the filing process. We also do not believe that delaying the opening of a filing window will substantially harm parties in the process of preparing an application for the Castle Rock allotment. The delay in the opening of the filing window resulting from the stay will be relatively minor, and in the event the allotment is deleted, the stay will actually minimize harm to the applicants. Finally, we believe that it is in the public interest to avoid a situation in which applicants file for an allotment which is ultimately deleted. In addition to the harm which may be visited upon the applicants, it would not be conducive to the overall efficient transaction of Commission business to expend administrative resources in processing such applications.

4. Accordingly, pursuant to Section 1.102(b)(3) of the Commission's Rules, IT IS ORDERED, That the action in the *Report and Order* in this proceeding establishing a July 23, 1991 to August 22, 1991, filing window for the Channel 296C3 FM allotment at Castle Rock, Washington, IS HEREBY STAYED pending further action.

5. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 418

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: July 15, 1991; Released: July 15, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 18, 1991, Bell Atlantic Telephone Companies filed Transmittal No. 418 to clarify what access charges are applied to interexchange carriers (IXCs) when the end user connection is provided by a Radio Common Carrier (RCC), including cellular telephone carriers. On April 12, 1991, American Telephone and Telegraph Company (AT&T) filed a petition to reject the transmittal. Bell Atlantic filed its reply on April 29, 1991. Transmittal 418 is scheduled to become effective on July 16, 1991. For the reasons discussed below, we reject Transmittal 418.

II. BACKGROUND

2. Bell Atlantic uses two different arrangements to provide interconnection with an RCC: "Type 1" connections, which route the call from a Bell Atlantic Class 4 switch to a Bell Atlantic Class 5 switch and then to the RCC's Mobile Telephone Switching Office (MTSO); and, "Type 2" connections, which connect the MTSO directly to the Bell Atlantic Class 4 switch.[1] Description and Justification (D&J) at 1.

3. According to Bell Atlantic, Transmittal 418 is intended to clarify that the only service Bell Atlantic provides and bills to IXCs for Type 2 arrangements is Local Transport. The revisions also provide further detail on the calculation of those charges. *Id.* at 2. Bell Atlantic states that the transmittal does not make any changes in access charges for Type 1 connections. *Id.* Bell Atlantic says it treats Type 1 connections the same way it treats switched access connections to "comparable" end user connections,[2] and thus it applies all switched access elements to Type 1 connections. *Id.* at 1-2. n.4.

III. PLEADINGS

Petition

4. In its petition to reject, AT&T says that these tariff revisions would apply Carrier Common Line (CCL) charges to Type 1 connections. AT&T Petition at 1. AT&T states that CCL charges recover the local exchange company's (LEC's) costs of providing subscriber loops. In Type 1 connections, according to AT&T, the RCC's network, not the LEC's common line facilities, provides the connection between the LEC switch and the end user. *Id.* at 2. Therefore, AT&T argues that assessment of CCL charges to IXCs in Type 1 interconnections violates Section 60.105(a) of the Commission's Rules, 47 C.F.R. § 69.105(a), [3] and on that basis the transmittal should be rejected. *Id.* at 3.

Bell Atlantic Reply

5. Bell Atlantic responds that AT&T is wrong for two reasons. First, according to Bell Atlantic, Transmittal 418 makes no changes to the tariff for Type 1 connections, but only deals with Type 2 connections. AT&T does not challenge the treatment of Type 2 connections. Bell Atlantic Reply at 2. Second, Bell Atlantic argues that Type 1 connections do use a subscriber loop connection and are similar to a PBX trunk for which CCL charges are applied. *Id.* at 2-3. Bell Atlantic contends that it has consistently applied the same CCL charges to the trunks used by RCCs for Type 1 connections as it applies to PBX trunks, and the transmittal does not change that policy. *Id.* at 3.

IV. DISCUSSION

6. After reviewing Transmittal 418, the Description and Justification, AT&T's petition, and Bell Atlantic's reply, we conclude that Transmittal 418 violates the Commission's rules concerning the assessment of CCL to IXCs by applying CCL charges to Type 1 connections. Contrary to Bell Atlantic's assertion, Transmittal 418 does amend tariff language regarding access charges for Type 1 connections. Prior to the filing of this transmittal, Bell Atlantic's tariff did not mention access charges for interconnections to RCCs, either Type 1 or Type 2. Thus, even if Bell Atlantic has already been charging CCL for Type 1 connections, that practice was not reflected in the tariff. By including language in the definition of "RCC Connections" which provides that Type 1 connections are subject to all applicable switched and CCL charges, Bell Atlantic has now conformed its tariff to its practice. Such a clarification may be challenged in a petition to reject even if it does not change the carrier's actual practice.

7. We conclude that charging CCL to IXCs for RCC connections is not consistent with the Commission's rules. In establishing the interstate access charge structure, the Commission designed CCL, along with subscriber line charges, to recover the LECs costs of providing subscriber loops.[4] Indeed, the access rules specifically state that CCL shall be assessed to IXCs that "use local exchange common line facilities."[5] 47 C.F.R. § 69.105(a). The facilities connecting an RCC's MTSO to the LEC's end office are not common line facilities, however.

8. The Commission has held on numerous occasions that an RCC is a common carrier and not an end user.[6] When a call originates or terminates at a mobile phone, it is the person who places or receives that call, not the RCC, who is the end user, and the connection between the end user and the switch, or MTSO in the case of cellular service, is provided by the RCC.

9. The Commission has also specifically held that RCCs are not end users for the application of access charges and thus should not be assessed the end user charges, including subscriber line charges.[7] Consequently, LECs can not assess subscriber line charges to RCCs for the connection between the MTSO and the LEC switch. Neither can LECs assess such charges to actual end users because the

facility is not dedicated to a particular end user. Therefore, the facility is not a common line for purposes of the access charge rules and an exchange carrier cannot assess end user or carrier common line charges to anyone for the use of such a facility. The costs must be recovered outside of the access system. LECs have in fact recovered the costs of the connection between the MTSO and the LEC switch through intercarrier agreements between the RCC and the LEC.[8] Thus, the assessment of a charge for such facilities upon the IXC not only violates the access charge rules, it would result in charges to the IXC and the RCC for the same facility.

10. Bell Atlantic's comparison between Type 1 connections and PBX trunks is inappropriate, and the authorities cited by Bell Atlantic do not support its argument. *See* Bell Atlantic Reply at 2-3. In comparing Type 1 connections to PBX connections in its *Declaratory Ruling*, the Commission was merely likening the technical aspects of the interconnection to the physical structure of a PBX system. 2 FCC Rcd at 2914 (para. 33). Contrary to Bell Atlantic's interpretation, that discussion was not meant to provide an analogy for the application of access charges for that service. Indeed, it is clear that PBX service is quite different than that of RCC interconnections. Most notably, a PBX trunk is a connection between an end user premise and the LEC switch. A Type 1 connection, on the other hand, links the LEC to the MTSO, which is not an end user premise. By treating Type 1 connections like a PBX service, and charging CCL to an IXC for those connections, Bell Atlantic is not conforming with Commission policy.

11. Further, there is no reason to treat Type 1 connections differently from Type 2 connections in regard to CCL charges. The only relevant difference between these two types of interconnection is that Type 1 connections require more switching services from the LEC.[9] Both types of interconnection are subject to intercarrier agreement, and in both cases the call goes through the RCC's MTSO before being routed to the mobile phone. This difference, while justifying an additional switching charge for Type 1 connections, does not justify the imposition of CCL for those connections.

12. Inasmuch as the tariff would apply Carrier Common Line charges to a service which does not use common line facilities, it violates Section 69.105(a) of the Commission's Rules, 47 C.F.R. § 69.105(a). Therefore, we must reject Transmittal No. 418.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 418 IS REJECTED.

14. IT IS FURTHER ORDERED that Bell Atlantic Telephone Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on one day's notice.

15. IT IS FURTHER ORDERED that Special Permission No. 91-592 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

16. IT IS FURTHER ORDERED that the petition against Bell Atlantic Telephone Companies, Tariff No. 1, Transmittal No. 418, filed by American Telephone and Telegraph Company IS GRANTED to the extent discussed herein, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The tariff contains the following definition: "Radio Common Carrier Connections - Type 1 and 2: Type 1 connections are those arrangements where the Telephone Company owns the switch serving the cellular network. Type 1 connections are subject to all applicable switched and Carrier Common Line charges. Type 2 connections are those arrangements where the switch serving the cellular network is provided by the RCC. Charges applicable to Type 2 connections are defined in 2.4.8 preceding." Bell Atlantic Tariff F.C.C. No. 1, 6th revised page 80 (issued March 18, 1991).

[2] Bell Atlantic compares a Type 1 connection to a private branch exchange (PBX) connection. D&J at 1, *citing* Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910, 2914 (para. 33) (1987) (*Declaratory Ruling*).

[3] Section 69.105(a) states: "A charge . . . shall be assessed upon all interexchange carriers that use local exchange common line facilities for the provision of interstate or foreign telecommunications services. . ." 47 C.F.R. § 69.105(a).

[4] *See* MTS and WATS Market Structure, CC Docket No. 78-72 Phase 1, Third Report and Order, 93 FCC 2d 241, *recon.*, 54 RR 2d 615 (1983), *further recon.* 97 FCC 2d 834 (1984) (*Access Charge Further Reconsideration*), *remanded in part sub nom.* NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1127 (1985).

[5] Common line facilities are the connections between the end user and the telephone company switch and represent fixed costs which do not vary with the number of outgoing or incoming calls.

[6] *E.g.*, "A cellular system operator is a common carrier, rather than a customer or end user . . . ." FCC Policy Statement on Interconnection of Cellular Systems, 59 RR 2d 1283, 1284 (para. 2) (1986) (*FCC Policy Statement*); "A cellular system operator is a common carrier and not merely a customer . . ." An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469, 496 (para. 56) (1981) (*Cellular Order*), *recon.* 89 FCC 2d 58, 80-82, *further recon.*, 90 FCC 2d 571, 576-577 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. dismissed Jan. 17, 1983).

[7] *Access Charge Further Reconsideration* 97 FCC 2d at 882 (para. 148). *See also FCC Policy Statement*, 59 RR2d at 1284 n.1 (RCCs are not end users subject to subscriber line charges).

[8] *See Cellular Order*, 86 FCC 2d at 495-96 *See also FCC Policy Statement*, 59 RR2d 1283; *Declaratory Ruling*, 2 FCC Rcd 2910.

[9] Type 1 connections go through LEC Class 4 and 5 switches, while Type 2 only goes through the LEC Class 4 switch before the call is delivered to the MTSO. *See Declaratory Ruling*, 2 FCC Rcd at 2914 (para. 33).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules
Regarding Computation of Time

ORDER

Adopted: August 1, 1991; Released: August 9, 1991

By the Commission:

1. In this order, the Commission adopts changes to its rules regarding computation of time, 47 C.F.R. § 1.4. The amendments are discussed below and set forth in the Appendix.

2. When a deadline is established for parties to take action, *e.g.*, to file appeals or petitions for reconsideration following a Commission or staff decision or other action, our time computation rules provide that the first day to be counted is the day after the day of public notice of the decision or action.[1] Public notice, in turn, is defined as the day *after* certain specified dates, *e.g.*, the date of Federal Register publication of a rule or the release date of a non-Rule Making decision.[2] Although the rules were clarified in 1987,[3] the definition of public notice continues to cause confusion.

3. The Commission's decision to define the date of public notice as the day after the date of the relevant Commission action was made "in order to make any 'race to the courthouse' a fair competition for all parties."[4] In 1988, however, Congress changed the federal venue statute to eliminate the "first-to-file" approach that had resulted in races to the courthouse and replaced it with a random selection approach involving all petitions for review filed within ten days of an agency action.[5] Accordingly, the need to define public notice so as to provide an extra day before the time period commences has been eliminated. Thus, we believe it is appropriate to amend section 1.4(b) of our rules to redefine public notice as "the day" that Commission action is taken, *e.g.*, the day that decisions are published or released, and thereby eliminate any confusion that has existed under our current rules. The first day to be counted in making time computations would still be the day after public notice, as newly defined. Several examples contained in the rule are also being modified to reflect these amendments.[6]

4. Because the amendments adopted herein are matters of agency practice and procedure, notice and comment is not required. 5 U.S.C. § 553(b)(A).

5. Accordingly, IT IS ORDERED that section 1.4 of the Rules and Regulations of the Federal Communications Commission IS AMENDED in the manner indicated in the Appendix to this Order, to be EFFECTIVE 60 days after publication in the Federal Register.[7]

6. Authority for this action is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.4(b) is amended by removing the note preceding paragraph (b)(1), and adding the following sentence at the end of paragraph 1.4(b), following the word "holiday." to read as follows: "For purposes of this section, the term 'public notice' means the date of any of the following events:".

3. In Section 1.4(b)(1), the second sentence of Example 1 is revised to read as follows: "Public notice commences on Wednesday, May 6, 1987." In the third sentence, the phrase "Friday, May 8" is removed and the phrase "Thursday, May 7" is added in lieu thereof.

4. In Section 1.4(b)(1), Example 2 is removed.

5. In Section 1.4(b)(1), Example 3 is redesignated as Example 2. In the second from the last sentence, the phrase "Friday, June 12" is removed and the phrase "Thursday, June 11" is added in lieu thereof. In the last sentence, the phrase "Friday, June 26" is removed and the phrase "Thursday, June 25" is added in lieu thereof.

6. In Section 1.4(b)(2), Example 4 is redesignated as Example 3. The new Example 3 is revised to read as follows:

§ 1.4(b)(2)

* * * * *

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

* * * * *

7. In Section 1.4(b)(3), the first sentence is amended by removing the phrase "at 3 p.m. Eastern Time on the day following" and adding in lieu thereof the phrase "on the day of". The second sentence is amended by removing the phrase "at 3 p.m. Eastern time on the day following the" and adding in lieu thereof the phrase "on the" before the words "release date,".

8. In Section 1.4(b)(3), Example 5 is redesignated as Example 4. The new Example 4 is revised to read as follows:

§1.4(b)(3)

* * * * *

Example 4: An order establishing an investigation of a tariff, and designating issues to be resolved in the investigation, is released on Wednesday, April 1, 1987, and is published in the FEDERAL REGISTER on Friday, April 10, 1987. If the decision itself specifies FEDERAL REGISTER publication, the date of public notice is Friday, April 10, 1987. If this decision does not specify FEDERAL REGISTER publication, public notice occurs on Wednesday, April 1, 1987, and the first day to be counted in computing filing periods is Thursday, April 2, 1987.

* * * * *

9. In Section 1.4(b)(4), Example 6 is redesignated as Example 5. The final sentence of the example is revised to read as follows: "The date of public notice commences on the day of the release date."

10. In Section 1.4(b)(4), Example 7 is redesignated as Example 6. The first sentence of the example is amended by removing the phrase "at 3 p.m. Eastern Standard Time September 3, 1987, the day after release.", and adding in lieu thereof the phrase "on September 2, 1987." In the second sentence the phrase, "Friday, September 4," is removed and the phrase, "Thursday, September 3," is added in lieu thereof.

11. In Section 1.4(b)(5), Example 8 is redesignated as Example 7 and the note currently following Example 8 is removed. The second sentence of the example is revised to read as follows: "The date of public notice commences on the day appearing on the license mailed to the applicant or appearing on the face of the letter granting the waiver mailed to the licensee."

12. In Section 1.4(c), Example 9 is redesignated as Example 8.

13. In Section 1.4(d), Example 10 is redesignated as Example 9. The new example is revised to read as follows:

§ 1.4(d)

* * * * *

Example 9: Paragraph 1.4(b)(1) of this section provides that "public notice" in a notice and comment rule making proceeding begins on the day of FEDERAL REGISTER publication. Paragraph 1.4(b) of this section provides that the first day to be counted in computing a terminal date is the "day after the day" on which public notice occurs. Therefore, if the Commission allows or requires an action to be taken 20 days after public notice in the FEDERAL REGISTER, the first day to be counted is the day after the date of the FEDERAL REGISTER publication. Accordingly, if the FEDERAL REGISTER document is published on Thursday, July 23, 1987, public notice is given on Thursday, July 23, and the first day to be counted in computing a 20 day period is Friday, July 24, 1987. The 20th day or terminal date upon which action must be taken is Wednesday, August 12, 1987.

* * * * *

14. In Section 1.4(d), Example 11 is removed.

15. In Section 1.4(g), Example 12 is redesignated as Example 10.

16. In Section 1.4(h), Example 13 is redesignated as Example 11.

17. In Section 1.4(i), Example 14 is redesignated as Example 12.

18. In Section 1.4(j), the first sentence is revised to read as follows: "If, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day." * * *

19. In Section 1.4(j), Example 15 is redesignated as Example 13.

FOOTNOTES

[1] 47 C.F.R. § 1.4(b).

[2] *Id.*

[3] *Amendment of the Rules Regarding Computation of Time*, 2 FCC Rcd 7402 (1987), *corrected*, 3 FCC Rcd 6276 (1988).

[4] *Addition of New Section 1. 103*, 85 FCC 2d 618, 621 (1981). Court appeals could not be filed prior to the date of "entry" of the decision, which under the rules, is the date of public notice. Defining the date of public notice as the day after the relevant decision date ensured that parties could not win courthouse races merely because of differences in time zones.

[5] Pub. L. No. 100-236, 101 Stat. 1731 (1988), codified at 28 U.S.C. § 2112(a)(1). The Commission has adopted rules implementing the new venue statute. 47 C.F.R. § 1.13; *Addition of New Section 1.13 to the Commission's Rules of Practice and Procedure*, 4 FCC Rcd 2092 (1989).

[6] In addition, the Commission is amending section 1.4(j) to make more explicit the fact that the "filing date" is not determined under the rule until after all other computations are made.

[7] The new rules should be applied to determine the public notice date for Commission actions taken on or after the day the new rules become effective, while the current rules should be applied to determine the public notice date for Commission actions taken before the day the new rules take effect. For example, assuming the new rules take effect on September 11, the date of public notice for a Commission rule published in the Federal Register on September 11 would be September 11 (as determined pursuant to the new rules). However, again assuming the new rules take effect September 11, the date of public notice for a Commission rule published in the Federal Register on September 10 would be September 11 (as determined pursuant to the current "day after the day" rule).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access by Persons with Hearing Impairments or Other Disabilities to Telecommunications Equipment and Services

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1991; Released: August 7, 1991

By the Commission:

I. INTRODUCTION

1. By *Memorandum Opinion and Order and Making* in CC Docket 87-124, 5 FCC Rcd 3434 (1990) (*MO&O*), the Commission ruled that all credit card telephones and all telephones in common areas of the workplace must be hearing aid compatible (HAC) no later than May 1, 1991. A Petition for Reconsideration (petition) was filed by GTE Service Corporation (GTE). North American Telecommunications Association (NATA) filed comments in support of the petition. An opposition to the petition was filed jointly by a number of organizations which we designate collectively as AG Bell, to which GTE replied.[1] In this *Memorandum Opinion and Order* we deny GTE's petition for reconsideration.[2]

II. BACKGROUND

2. The *MO&O* reversed findings made earlier in the *First Report and Order* in CC Docket No. 87-124, 4 FCC Rcd 4596 (1989) (*First Report*). The *First Report* reasoned that the Commission need not adopt final rules requiring all credit card telephones and telephones in common areas of the workplace be made hearing aid compatible as was proposed in the *Notice of Proposed Rulemaking and Further Notice of Inquiry* in CC Docket No. 87-124, 3 FCC Rcd 1982 (NPRM). The Commission noted that after the *NPRM* was released, Congress passed the Hearing Aid Compatibility Act of 1988 (HAC Act).[3] The HAC Act required that nearly all telephones sold and intended for use in the United States after August 16, 1989, whether domestically manufactured or imported, be HAC. The Commission reasoned that as telephones are replaced in the ordinary course, non-HAC telephones in common areas of the workplace and non-HAC credit card telephones (if there are any) will be replaced eventually by HAC telephones.

3. Representatives of persons with hearing impairments sought reconsideration of the *First Report*. They argued that the Commission has a statutory duty to establish regulations which will ensure the hearing impaired reasonable access to telephone services and that refusing to adopt the rules as proposed was inconsistent with this obligation. In the *MO&O*, the Commission agreed that these telephones should be made HAC. Thus, non-HAC telephones in these areas would need to be HAC by May 1, 1991, even if retrofitting were required. Noting that the HAC Act forbids the Commission to require retrofitting of existing telephones unless such telephones were either coin operated or provided for emergency use, *see* 47 U.S.C. Section 610(f), the Commission found that all credit card telephones and telephones in common areas of the workplace should be treated "as essential telephones provided for emergency use." The Commission further found that the cost of retrofitting such phones was small, noting that according to the Senate Report accompanying the HAC Act, the cost of retrofitting a telephone unit for HAC is $1.50. The Commission reasoned that the total number of telephones involved is likely to be small since most credit card and workplace telephones already are HAC. Although costs of compliance should be low, potential benefits would be high because persons with hearing impairments would better be able to cope with emergencies and also would be able to travel and work more effectively. It found its action to be consistent with congressional intent and that the Commission has discretion in defining what should be considered emergency telephones.

III. CONTENTIONS

4. In its petition, GTE asserts that the Commission used erroneous data in its analysis which led it to expand its definition of "essential telephones" to include credit card telephones and all telephones in common areas of the workplace. In particular, GTE opposes the requirement in the *MO&O* that all such telephones be retrofitted to be HAC by May 1, 1991. GTE's petition questions the figure of $1.50 per unit that was cited in the *MO&O* as the average cost for accomplishing the conversion. GTE states:

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[1] The opposition was filed jointly by the following organizations: The Alexander Graham Bell Association for the Deaf, Maryland Office of People's Counsel, National Center for Law and the Deaf, New York League for the Hard of Hearing, Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Governor's Office for Handicapped Individuals, Telecommunications Exchange for the Deaf, Inc., Telecommunications for the Deaf, Inc., Minnesota Telecommunications Access for Communicatively Impaired Persons, California Center for Law and the Deaf, Arizona Council for the Hearing Impaired, and National Association of the Deaf.

[2] The *Further Notice* portion of the *MO&O* proposed a new rule that all workplace and hospital telephones be HAC no later than May 1, 1992. Numerous parties have commented on this proposal. Those separate issues will be considered in a separate order. We emphasize, however, that the Commission's requirement that all credit card telephones and all telephones in common areas of the workplace must be HAC has been in effect since May 1, 1991. *See* Section 68.112 of the Rules.

[3] The Hearing Aid Compatibility Act of 1988, Pub. L. 100-394,102 Stat. 976, Aug. 16, 1988, as codified in 47 U.S.C. Section 610.

> In context, the $1.50 per unit retrofit cost discussed at p. 5 of the Senate Report and cited to at Paragraph 14 of the [*MO&O*] referred to costs at the time of manufacture. If a telephone is already at a rehab or refurbishing center, GTE estimated the cost to range from $2.60 to $4.50 per unit to make it HAC... and even this amount of additional cost could make refurbishing uneconomic and close down many small refurbishers....

petition at n. 4. GTE further asserts that the Commission "confused the incremental cost of manufacturing a HAC telephone in the first instance with the costs of dispatching an installer, possibly changing out the handset, or ... if the telephone never came in a HAC version... changing out the entire instrument." *Id.* at p. 3. Moreover, argues GTE, because the parties affected by the Commission's new rules are to a large extent not the telephone companies but the end users, the Commission should take into account that it will need to educate the public about the existence of its requirements and to devise sanctions for noncompliance.

5. In its comments, NATA agrees with GTE's assertion that the $1.50 figure cited in the *MO&O* greatly underestimates the true cost per unit of performing the retrofit to make a telephone HAC. NATA asserts that the Commission's approach in determining to expand the definition of essential telephones suffers from a number of irregularities including faulty cost benefit analysis and "an unjustifiable departure from the established congressional policy *not* to require retrofitting to meet HAC objectives." NATA comments at p. 2. Instead, NATA gives an estimated total cost figure of $43.75 per telephone for accomplishing the conversion. Moreover, NATA states, congressional intent was that only phones "provided for emergency use" be retrofitted, citing 47 U.S.C. Section 610(b), and states its belief that Congress intended to narrowly limit the class of emergency telephones to those located in mine shafts, elevators, and the like. Finally, NATA states that the *MO&O* requires that "telephones in common areas" be retrofitted to make them HAC but does not clearly define the term "common areas."

6. In its opposition, AG Bell states that the Commission's cost analysis was correct and that GTE's cost figures are unsupported. It further argues that hearing aid wearers would be left without an "interim remedy" should the Commission decide to reconsider the *MO&O* because the cost of an amplifier/adapter may be prohibitive for low income people, and, further, amplifier/adapters are difficult to use and not convenient for children, elderly people, and handicapped people. Moreover, argues AG Bell, requiring hearing impaired people to use an amplifier/adapter is discriminatory.

7. In its reply, GTE declares that the primary question which determines the validity of the cost benefit analysis done by the Commission is whether the FCC used erroneous cost data. To support this assertion it points out that the Senate Report arrived at a cost of "$1.50 or more" but that the Commission took the cost per unit as $1.50.

IV. DISCUSSION

8. GTE's arguments are misplaced. The Commission's decision requiring that all credit card telephones and common area workplace telephones be HAC by May 1, 1991, was based not merely on its judgment that any retrofitting necessary to meet this requirement would be inexpensive. Instead, the Commission did a cost/benefit analysis and determined that, given the small number of telephones involved, the benefits gained by accessibility to a class of frequently used telephones by people with hearing impairments outweighed the costs involved. The benefits identified by the Commission were enabling people with hearing impairments to deal more readily with emergencies, to travel more readily throughout this country, and to participate fully in the marketplace.[4] Neither GTE nor NATA demonstrates these benefits are not likely. Accordingly, we find that even if the cost per unit of retrofitting may be, as alleged, substantially higher than the $1.50 figure mentioned in the *MO&O*, there is no evidence that the universe of telephones involved is large, or that costs to any particular entity are significant. We conclude that even any such costs are outweighed by the benefits. Neither GTE nor NATA has presented evidence to challenge the fundamental assumptions of our cost/benefit analysis or to cause us to depart from our original conclusion.

9. Nor can we accept NATA's contention that the *MO&O* did not clearly define the term "common areas." At para. 15 of the *MO&O* the Commission stated that," [t]he term is intended to cover such places as libraries, cafeterias, conference rooms and other areas which are equipped with telephones and where employees are reasonably expected to congregate." Moreover, the Commission stated that," [w]hile it would be impossible to specifically delineate all such areas exhaustively, employers should resolve questions in favor of ensuring compliance." In other words, employers should decide whether a specific work area should be defined as a common area and should be guided by the examples given in the *MO&O*, resolving questionable situations in favor of expanding equal access to persons with hearing impairments. In these circumstances we conclude that the *MO&O* gives sufficient guidance as to the definition of "common areas," and we do not believe that any further clarification is required.

10. Finally, we reject NATA's contention that the Commission erroneously classified common area and credit card telephones as emergency telephones thereby justifying retrofitting pursuant to Section 610(f) of the Act. As the Commission stated in the *MO&O:*

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[4] Since the *MO&O* was released, the Americans with Disabilities Act of 1990 has been enacted into law. S. 933, Pub. L. 101-336, 104 Stat. 327, 366-78 (1990) (ADA). The ADA mandates that the Commission "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." 47 U.S.C. Section 225(b)(1). In view of this latest expression of public policy by the Congress and the President, we believe it would be particularly invidious to roll back the requirements of the *MO&O* and deprive people with hearing impairments of equal access to the public communications facilities described herein.

> [t]he use of credit card telephones in our society has proliferated to the point that they are a widely used means of communication. These telephones should be available for emergency use by persons with impaired hearing. It is impossible to determine when and where an emergency will arise, and when it does, whether a HAC credit card telephone will be accessible for a person with impaired hearing.

MO&O at 3435. The Commission went on to say that," [b]ecause hearing impaired employees will use common areas, these telephones are appropriately treated as 'emergency' in that they may be needed during an emergency and even for frequent use." *Id.* at 3436. We believe this interpretation of the statutory term "emergency use" is consistent with congressional intent. The House Report accompanying the HAC Act provides: "[t]he Committee intends the term [telephones used for emergency use] be defined to include, but not be limited to telephones in elevators, mine shafts, and any other place where a hearing impaired person might be isolated in an emergency."[5] The parties have cited no evidence that Congress intended to deprive hearing aid users access to public and semi-public telephones that may be needed in emergencies where the Commission finds the benefits of providing access outweigh the costs. Thus, we conclude that neither GTE nor NATA has presented persuasive evidence to cause us to depart from the conclusions reached in the *MO&O*.[6]

V. CONCLUSION

11. GTE's petition to reconsider the requirement that all credit card and common area telephones be HAC by May 1, 1991, is denied. In adopting this requirement the Commission stated in the *MO&O* at p. 3437, that," [w]e believe substantial benefits will result, while the costs of retrofitting or replacing sooner than otherwise would be the case, should be small." We have not been presented with persuasive evidence to cause us to depart from this conclusion.

VI. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by GTE Services Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] H. R. Rpt. No. 100-674, 100th Cong. 2d Sess. (1988) at 15.

[6] We believe that GTE's point that the Commission should adopt appropriate procedures to educate the public about the existence of our rules does not justify rolling back the rules, as suggested by GTE. Indeed, we do intend to publicize our rules through the issuance of a Public Notice. Moreover, we disagree with GTE that we must "devise" sanctions for noncompliance with these rules. Sanctions are already in place and available to be utilized to insure compliance by all relevant parties. *See* Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. section 503. Further, we note GTE's statement that the appendices to the *MO&O* suggest that telephones in common areas of the workplace and credit card telephones installed before January 1, 1985 are grandfathered and need not be HAC by May 1, 1991; and hereby clarify that *all* common area and credit card telephones must be HAC by May 1, 1991. Because we have designated these telephones as telephones for emergency use, no grandfathering is appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-143

In the Matter of

Arizona Public Safety Plan

ORDER EXTENDING COMMENT PERIOD

Adopted: July 5, 1991; Released: July 10, 1991

By the Chief, Private Radio Bureau:

1. On May 16, 1991, the regional public safety plan for Arizona (Region 3) was placed on Public Notice. The specified deadlines for comments and reply comments were June 25, 1991 and July 10, 1991, respectively.

2. On June 24, 1991, the American Private Radio Association (APRA) filed a motion requesting an extension of the deadlines for comments and reply comments by approximately 30 days. APRA stated that the plan was unavailable for inspection and could not be obtained by the Downtown Copy Center.

3. The Arizona plan has been available from the Commission's Public Reference Room in Washington, D.C. since the Public Notice was released on May 16, 1991. However, to afford interested parties a full oppportunity to participate in this proceeding we will extend the due dates of all comments and reply comments.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that all interested parties will have until **July 30, 1991** to file comments and until **August 14, 1991** to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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